PETITION FOR WRIT OF CERTIORARI

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Supreme Court, U.S.
FILED

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No. ~~OFFICE~~ OF THE CLERK

In the
Supreme Court of the United States

DIPPIN' DOTS, INC., and CURT JONES,

Petitioners,

v.

THOMAS R. MOSEY, *et al.*

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition requests review of a $3.8 million attorney fees award issued in 2007 under §285 of the Unites States Patent Act, which included $2.6 million of attorney fees attributed to work on a reversed antitrust ruling. In 2005, the district court granted the $2.6 million antitrust attorney fees award, but denied attorney fees under §285 of the Patent Act at that time because the § 285 attorney fees were already attributed to work performed on the antitrust claims.

On appeal, the Court of Appeals for the Federal Circuit reversed the antitrust rulings and vacated the $2.6 million antitrust attorney fees awards. Upon remand, the district court reinstated the previously vacated antitrust attorney fees under 35 U.S.C. §285 as "exceptional case" attorney fees, and increased the attorney fees award by an additional $1.2 million dollars.

When making the §285 attorney fees award, the district court failed to properly apportion fees for work performed on the reversed antitrust claims from the attorney fees for work conducted exclusively on patent matters. The district court also failed to properly consider other factors that weighed against making a §285 attorney fees award, which was affirmed without opinion on appeal. This Petition should be granted to address the following questions:

1. Whether it is proper to award "exceptional case" attorney fees under §285 of the Patent Act for work previously attributed to work on a reversed antitrust claim?

2. Whether an award of attorney fees under 35 U.S.C. §285 is proper in view of the absence of a threshold showing of bad faith intent on the part of the patent holder?

3. Whether, in order to avoid a "taking" of the Plaintiff's property in violation of the Fifth Amendment to the United States Constitution, the district court's analysis of §285 attorney fees should have included consideration of the Plaintiff as a prevailing party in the antitrust claims, the district court's disagreement with the jury findings of intent against the patent holder, and the Federal Circuit's rulings regarding no highly egregious bad faith conduct on the part of the Plaintiff, no material misrepresentations by the Plaintiff to the Patent Office, and no direct evidence of bad faith intent?

PARTIES TO THE PROCEEDINGS
(Rule 14(b))

A list of all parties to the proceedings in the court whose judgment is the subject of this Petition is as follows:

Plaintiff-Petitioner: Dippin' Dots, Inc. and Curt D. Jones, an individual.

Defendant-Respondents: Thomas R. Mosey, Dots of Fun, International Laser Expressions, Inc. (also known as I.LE., Inc.), and Frosty Bites Distribution LLC.

Defendant-Respondent and Counterclaimants: Nicholas Angus and Frosty Bites, Inc. (now known as Mini Melts, Inc.)

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE PETITION 10

I. The Failure to Apportion Fees Attributed to Antitrust Work From Fees Attributed to Patent Work Was an Error 10

II. "Exceptional case" Attorney Fees Under U.S.C. § 285 Should Only Be Awarded With Findings of Bad Faith, Deliberate Fraud, or Deceptive Intent 15

TABLE OF CONTENTS, Continued

III. There Was an Improper "Taking" Without Due Process by the District Court's Failure to Fully Consider the Status of the Prevailing Parties and the Other Considerations Under § 285 of the Patent Act 23

CONCLUSION 25

APPENDIX A – Opinions Below

Transcript of Hearing on Rule 50 Motion Before Honorable Judge Thomas W. Trash, Jr., United States District Judge........................ 1a

Order dated June 3, 2004, granting Frosty Bites Distribution's Motion for Attorneys Fees and Costs under the Clayton Act.................. 5a

February 18, 2005 Final Judgment 13a

Opinion and Order of August 4, 2005 .... 18a

Opinion and Order of August 4, 2005 .... 23a

Order of August 4, 2005 .... 29a

Order of October 13, 2005 .... 30a

February 9, 2007 Fed. Cir. Decision.................. 31a

TABLE OF CONTENTS, Continued

Opinion and Order dated October 30, 2007 ....56a

Opinion and Order dated April 24, 2008 ....69a

Judgment of November 6, 2008 ....71a

December 16, 2008 Denial of Petition for Rehearing 74a

TABLE OF AUTHORITIES

Cases: *Page*

Arbrook, Inc. v. Am. Hosp. Supply Corp.,
645 F.2d 273 (5th Cir. 1981) 16

Argus Chem. Corp. v. Fibre Glass-Evercoat Co.,
812 F.2d 1381(Fed. Cir. 1987) 17

Barron v. Baltimore,
7 Pet 243 (1833)..23

Bode v. United States,
919 F.2d 1044 (5th Cir. 1990) 11

DDI v. Mosey,
476 F.3d 1346 (Fed. Cir. 2007) 13,17,20

Dolan v. City of Tigard,
512 U.S. 374 (1994)..23

Gardco Mfg., Inc. v. Herst Lighting Co.,
820 F.2d 1209 (Fed. Cir. 1987) 16

Gjerlov v. Schulyler Labs., Inc.,
131 F.3d 1016 (Fed. Cir. 1997) 11

Hensley v. Eckerhart,
461 U.S. 424 (1983) 11

J.P. Stevens Co., Inc. v. Lex Tex Ltd., Inc.,
822 F.2d 1047 (Fed. Cir. 1987) 15

TABLE OF AUTHORITIES, Continued

Louisiana Power & Light Co. v. Kellstrom,
50 F.3d 319 (5th Cir. 1995) 11

Machinery Corp. of America v. Gullfiber AB,
774 F.2d 467 (Fed. Cir. 1985) 11

Nilssen v. Osram Sylvania, Inc.,
528 F.3d 1352 (Fed. Cir. 2008) 15,16,21

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 23

Robinson v. Ariyoshi,
441 F. Supp. 559 (D. Hawaii 1997), *aff'd in relevant part*, 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds*, 475 U.S. 902 (1986) 23

Stevens v. City of Cannon Beach,
510 U.S. 1207 (1994) 23

United States v. Unimex,
991 F.2d 546 (1993) 23

Statutes:

35 U.S.C. §285 10,13,15,22

Constitution, Bill of Rights,
Fifth Amendment 23

PETITION FOR WRIT OF CERTIORARI

Dippin' Dots, Inc. and Curt D. Jones respectfully petition for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Federal Circuit, which affirmed the district court's attorney fees award.

OPINIONS BELOW

The judgment of the Court of Appeals for the Federal Circuit affirming, without opinion, the §285 attorney fees award is reprinted in the appendix hereto, App.71a-73a. The filing and denial of the request for reconsideration has not been reported and is reprinted in the appendix hereto, App. 74a-76a. The district court's 2007 Order granting the §285 attorney fees is reprinted in the appendix hereto at, App. 56a-68a.

The district court's prior 2005 Order denying the §285 attorney fees and denying a request for reconsideration is reprinted in the appendix hereto, App. 29a-30a. The district court's 2005 Order finding exceptional case is reprinted in the appendix hereto, App. 18a-22a. The district court's 2005 Order awarding Clayton Act attorney fees is reprinted in the appendix hereto, App. 5a-12a and 23a-28a. The opinion from the Court of Appeals for the Federal Circuit reversing the antitrust rulings and vacating the 2005 attorney fees is reprinted in the appendix hereto, App. 31a-55a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Supreme Court Rule 13.1 and 13.3. This Petition for Writ of Certiorari is being deposited with United States Postal Service, First Class Mail and Federal Express Overnight Delivery Service on March 13, 2009 for delivery to the United States Supreme Court on or before March 16, 2009. The filing of this Petition should be deemed to occur within ninety (90) days of the denial of a Petition for Panel Rehearing and Rehearing En Banc filed with the U.S. Court of Appeals for the Federal Circuit, which occurred on December 16, 2008. *Order, App. A,.*

The Petitions for Panel Rehearing and Rehearing En Banc were filed the Federal Circuit on November 20, 2008, within fourteen days of date of the Judgment and Order of the U.S. Court of Appeals for the Federal Circuit dated November 6, 2008. The November 6, 2008 Judgment and Order of the U.S. Court of Appeals for the Federal Circuit was issued based on an appeal notice filed November 28, 2007 and amended notice filed April 29, 2008 requesting relief from the District Court's decisions dated October 30, 2007 and April 24, 2008, respectively.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I, Section 8, Paragraph 8 of the United States Constitution provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Section 285 of Title 35 (Patent Act) provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party."

STATEMENT OF THE CASE

Curt D. Jones is the creator of the novelty ice cream product known as Dippin Dots®, which is ice cream made by flash freezing a liquid ice cream mixture in liquid nitrogen. *Final Judgment, App. 13a.* In 1989, Mr. Jones' patent attorney filed for patent protection on the method of making and serving the beaded ice cream using liquid nitrogen to flash freeze the liquid ice cream mixture, including specific limitations regarding the temperatures required for long-term storage, tempering (warming), and service of the beads of ice cream. *Id. at App. 13a; §285 Attorney Fees Order (denied in part, granted in part).* The United States Patent & Trademark Office issued U.S. Patent No. 5,126,156 to Mr. Curt Jones on June 30, 1992, and Mr. Jones licensed his patent to Dippin' Dots, Inc. ("DDI"). *Id. at 14a.*

The Dippin' Dots® product proved to be quite successful in the market with consumers of all ages. As is the case when a product becomes well-received by the public, competitors migrate into the market and place new pressures on existing businesses. In 1995, Mr. Thomas Mosey and his partner Nicholas Angus tried the Dippin' Dots® product at a shopping mall. As a result of their exposure to Dippin' Dots®, these gentlemen started a new business in early 1996 that directly competed with Dippin' Dots®. Messrs. Mosey and Angus began producing a competing flash frozen ice cream product called "Dots of Fun," and began selling their version of the novelty ice cream in a mall located near Dallas, Texas.

In order to protect their market, the Plaintiffs, Dippin' Dots, Inc. and Curt D. Jones, filed an initial Complaint against "Dots of Fun" and Mr. Mosey in 1996 alleging patent and trademark infringement. *Id. at 14a.* The Defendants subsequently changed their product name from "Dots of Fun" to "Mini Melts," and as time progressed, the Defendants began to produce a more "irregular" shaped ice cream product instead of a predominately "beaded" ice cream product. As the initial patent litigation was proceeding before the U.S. District Court for the Northern District of Texas in 1999, several Dippin' Dots distributors entered into a distributorship agreement with Mr. Mosey and Mr. Angus, and replaced their Dippin' Dots® product with a new product called "Frosty Bites" produced by the Defendants. "Frosty Bites" was another novelty ice cream the Defendants produced by flash freezing liquid ice cream mix in liquid nitrogen.

The Defendants and their new customers (old Dippin' Dots distributors) subsequently filed a number of declaratory judgment cases against Dippin' Dots, Inc., and Dippin' Dots, Inc. named these Frosty Bites Distributors as co-defendants in the Initial Patent litigation. *Id. at 14a.* Dippin' Dots, Inc. also filed several independent legal actions against the Frosty Bites distributors alleging trade dress infringement. *Id. at 14a.* Based on these numerous related actions, a Request for Multidistrict Litigation designation was made by the Defendants and granted in 2000. *Id. at 14a-15a.* All related cases were transferred to a single district court

judge, who conducted discovery, issued dispositive orders, and sat as the trial judge in 2003. *Id. at 15a.*

Before the trial, summary judgment orders were issued by the district court judge finding that the "Frosty Bites" product was not an all "beaded" ice cream product (i.e., irregular shapes present), and therefore did not infringe U.S. Patent No. 5,126,156. *Final Judgment, App. 15a-16a, also Order, Aug. 4, 2005, App. 19a-20a.* The district court conducted a jury trial on patent invalidity after denying motions for summary judgment finding that undisclosed prior art sales may have been covered by the "experimental use" exemption in the patent law, which would have eliminated the need to disclose such prior art to the Patent Office during prosecution of U.S. Patent No. 5,126,156. *Order, Aug. 4, 2005, App. 20a.*

After a trial was conducted in 2003, the jury found (1) the '156 Patent invalid as "obvious" based on the undisclosed prior art sales, (2) no experimental use exception was found to exist over the undisclosed prior art, (3) there was an intent to withhold material prior art by Mr. Jones and the prosecuting attorney; and (4) an antitrust violation was found to have occurred. *Id at 20a; Order, June 3, 2004, App. 6a-7a.* The jury, however, refused to award any damages to the Defendants for any reason, including the antitrust claims.

At a Rule 50 Motion hearing on the last day of the trial, the district court judge conceded that he did not agree with the jury's finding of intent to

withhold material prior art with respect to Mr. Jones as follows:

> With respect to number 6, the only evidence in the record, as I see it, with respect to Mr. Jones' intent is the fact that in his declaration, he did not disclose sales that clearly occurred prior to March of 1988. The jury apparently drew the inference from that, that there was intent to deceive.
>
> That's, I believe, the jury's prerogative. It's not necessarily the inference that I would have drawn from the evidence, but again, I think it's a classic jury issue, and I'm not going to overrule the decision by the jury with respect to Mr. Jones' intent.

Transcript, Rule 50 Motion Hearing, App. 3a. With respect to the prosecuting attorney, the district court found that the requisite intent was shown by his alleged material misrepresentations to the U.S. Patent & Trademark Office, in addition to the omission of the material references. *Id. at App. 3a-4a.*

In post-trial orders, the district court judge later found in favor of the Defendants for their claim of "inequitable conduct" finding that this case involved a high degree of egregious bad faith conduct, false misrepresentations to the United States Patent Office, and bad faith intent by both Mr. Jones and his prosecuting attorney. *Opinion, Feb. 9, 2007, App. 46a-49a.* The district court awarded attorney fees in the amount of $2.6 million under the antitrust rulings, but denied an award for the same attorney fees under 35 U.S.C. §285 to the extent those fees had already been attributed to

work on the antitrust claim. *June 3, 2004 Order, ($676,675.46 fees), App. 5a-12a; Aug. 4, 2005 Order, App. 23a-28a ($1.914,724.00 fees); Aug. 4, 2005 Order, App. 29a (denies duplicative §285 fees); Aug. 4, 2005 Order, App. 18a-22a (same).*

In the district court's attorney fees award, the district court's only reference to an exceptional case analysis was the finding that the jury had found bad faith intent by the Plaintiff. *Aug. 4, 2005 Order, App. 21a,* ("The jury's finding that Jones and his attorney committed fraud on the Patent Office compel a finding that this case is an exceptional case which warrants an award of attorney's fees.") The district court noted other factors were considered in the exceptional case analysis (e.g. closeness of the case, tactics of counsel, conduct of the parties), but "[n]one of these factors [were] sufficient to overcome the jury's findings of fraud on the Patent Office." *Id. at 21a.* Essentially, this is a finding that these other factors weighed in favor of the Plaintiff and in favor of denial of the attorney fees award.

On appeal, the U.S. Court of Appeals for the Federal Circuit reversed the district court's antitrust findings because there was not a sufficient showing of the requisite level of bad faith intent needed to support an antitrust violation. *Opinion, Feb. 9, 2007, App. 48a-55a.* The Federal Circuit also found that this was not a case involving "highly egregious" bad faith conduct, there had been no false misrepresentations made by the Plaintiff to the Patent Office, and there was no direct evidence of any bad faith intent exhibited by the Plaintiff. *Id. at 48a (note 4); 51a (statement was not false and*

statement was true); 52a (defendants submitted no intent evidence).

Specifically, the Federal Circuit stated as follows:

> The district court characterized DDI's intent to deceive as "of a high nature." We disagree, but believe that in light of the high materiality of the nondisclosure, inequitable conduct can still be found here even though the evidence reveals less than an egregiously willful intent to deceive.

App. 48a (note 4). The Federal Circuit affirmed the inequitable conduct findings based on an "inference" of bad faith intent arising from the "high materiality" of the undisclosed prior art sales, but reversed the district court's antitrust rulings and vacated all awards of attorney fees granted under the antitrust laws. *App. 46a-55a.*

Upon remand, the district court recognized the reversal of the district court's finding of bad faith by the U.S. Court of Appeals by the Federal Circuit, but the district court reinstated the $2.6 million attorney fees award under 35 U.S.C. §285 finding the same fees previously claimed for work on the antitrust claims could now be awarded under the Patent Act. *Oct. 30, 2007 Order, App. 61a-68a.* The district court found the case exceptional based on its own prior rulings and findings without analyzing the impact of the reversal of the antitrust rulings by the Federal Circuit or the impact of the other Federal Circuit's rulings on the absence of intent and lack of misrepresentations to the PTO. *Id. at App. 62a.*

Specifically, even though the Federal Circuit had found no egregious bad faith conduct, the district court indicated that the present case was "exceptional" based on the prior reasoning set forth in the 2005 orders and based on DDI's "inequitable, and in my view egregious, conduct before the PTO." *Id. at 62a.* According to the district court in the 2007 Order, DDI's "conduct before the Patent Office was inappropriate and, in my judgment, outrageous enough to warrant attorney fees." *Id. at 67a.*

In addition to this reinstatement of fees, the district court increased the attorney fees award by an additional $1.2 million in fees and $400.000.00 in interest. *Id. at 68a, and April 24, 2008 Order, 69a-70a.* The Petitioner appealed these decisions reinstating and increasing the attorney fees award by the district court to the U.S. Court of Appeals to the Federal Circuit. The Federal Circuit affirmed the district court's 2007 attorney fees award without opinion, and subsequently denied the Petition for Rehearing and Rehearing En Banc. *Orders, App. 71a-76a.* This Petition for Writ of Certiorari was filed requesting that this Court review the attorney fees and costs awards.

REASONS FOR GRANTING THE PETITION

The district court's attorney fees award under 35 U.S.C. §285 raises several fundamental errors that need to be addressed by the present Petition, including the failure to apportion attorney fees for work done on a reversed antitrust claim versus work performed exclusively on the patent matter, the failure to make threshold findings regarding a minimum level of intent to support an exceptional case attorney fees award under §285, and the full consideration of facts needed to avoid an unconstitutional "taking" from a multimillion dollar attorney fees award under §285 of the Patent Act.

I. THE FAILURE TO APPORTION FEES ATTRIBUTED TO ANTITRUST WORK FROM FEES ATTRIBUTED TO PATENT WORK WAS ERROR

The Federal Circuit has found that when "an action embraces both patent and non-patent claims, no fees under section 285 can be awarded for time incurred in litigation of non-patent issues." *Gjerlov v. Schulyler Labs., Inc.*, 131 F.3d 1016, 1025 (Fed. Cir. 1997) (quoting *Machinery Corp. of America v. Gullfiber AB,* 774 F.2d 467, 475 (Fed. Cir. 1985)). Under Fifth Circuit law, an applicant for attorney fees "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 324 (5th Cir. 1995)(*quoting Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983)). The applicant should maintain billing time records in a manner that will enable a

reviewing court to identify distinct claims." *Id.; see also, Bode v. United States,* 919 F.2d 1044, 1047 (5th Cir. 1990)(party seeking reimbursement of fees should submit billing records so that a reviewing court will be able to identify district claims).

On June 4, 2004, the district court awarded $676,675.46 in attorney fees under the Clayton Act to the one set of Defendants, and on August 4, 2005, the district court awarded $1,914,724.00 to the other group of defendants under the Clayton Act. *Orders, App. 5a-12a and 23a-28a.* When awarded, the work associated with the 2005 attorney fees awards, totaling $2.6 million, was claimed by the Defendants to have been incurred for the antitrust claims.

When first requested, the district court denied all §285 attorney fees in 2005 for any work claimed to have been done on the antitrust claims. *See Order, Aug. 4, 2005, App. 29a.* Specifically, the district court denied the §285 attorney fees request explicitly finding that the court has already "awarded [the requested] fees under the Clayton Act," and an "award of fees under the Patent Act would be duplicative and unreasonable." *Id.* The Defendants specifically requested that district court reconsider this position, but the district court denied that motion for reconsideration indicating that the "Defendants have not shown that the Court committed clear error" in denying the "request for duplicative fees under the Patent Act." *Order, Oct. 13, 2005, App. 30a.*

In a separate Order, the district court denied a request for §285 fees in 2005 as follows:

> An award of attorney's fees must be reasonable. Duplicative fees are not reasonable. The Court has previously awarded the Frosty Bites Distribution Defendants fees in the amount of $676,675.46 under the Clayton Act. The Defendants have not persuaded the Court that the current fee request does not duplicate at least in part the prior fee request. In their Reply Brief, the Defendants state that the vast majority of Alston & Bird's time after March 31, 2003, was spent on the antitrust claim. The Court has already awarded fees for that work.

Order, Aug. 4, 2005, App. 21a.

After reversal of the antitrust claims, the Federal Circuit vacated the award of $2.6 million dollars of attorney fees attributed to work done on the antitrust claims. *DDI v. Mosey,* 476 F.3d 1337, 1346-1349 (Fed. Cir. 2007), *App. 31a-55a, see App. 54a.* Upon remand, the district court reinstated this same $2.6 million in vacated attorney fees attributed to the work done on the antitrust claims as well as an additional fees and costs award, but awarded the same antitrust fees under §285 of the Patent Act. *Order, Oct. 30, 2007, App. 56a-68a.* The district court awarded these same fees as "exceptional case" attorney fees award under 35 U.S.C. §285. *Id.*

The exceptional case attorney fees are exactly the same fees previously characterized as duplicative of the attorney fees claimed by the Defendants to have been for work done on the antitrust claim. The

Defendants readily admit, and there is no dispute, that the fees subject to the district court's 2007 §285 attorney fees award include $2.6 million in fees previously awarded in the district court's antitrust attorney fees award, which was previously vacated by the Federal Circuit. In fact, the district court specifically found that the 2007 §285 "attorney fees award should include compensation for time spent on the antitrust claim." *Order, Oct. 30, 2007, App. 65a.*

In 2005, the Defendants characterized their billings supporting the $2.6 million attorney fees award as time attributed to the antitrust claims, and the district court flatly denied the request for a §285 attorney fees award for these same fees at that time because these fees were already attributed to work on the antitrust issues. Having chosen in 2005 to characterize the $2.6 million in attorney fees as attributable to work performed on the antitrust matters, the Defendants should not be allowed to re-characterize these same fees in 2007 as having been performed exclusively on the patent matters in the case.

When reinstating the $2.6 million attorney fees award, the district court failed to apportion, segregate or discount the §285 fees by the amount of attorney fees previously claimed to have been incurred from the work done on the antitrust claims. The Petitioner prevailed on the antitrust claims in this matter, yet the district court explicitly awarded the Defendants $2.6 million in attorney fees that included "compensation for the time spent on the antitrust claim." *Id. at 65a.* The district court awarded the very same attorney fees attributed to

the Defendants' failed antitrust claim, but the 2007 award simply re-characterized the award under §285 instead of the Clayton Act. The Plaintiff, even though it prevailed on the antitrust claims, has been unfairly assessed millions of dollars in attorney fees from the previously reversed claims and vacated awards. Such a result, if not reviewed by this Court, would be highly inequitable, and a substantial failure of justice under the law.

The district court should have discounted the fees award by the amount of fees previously attributed to work on the reversed antitrust claims. By not doing so, the district court clearly abused its discretion in this matter and the Federal Circuit committed clear error by affirming that award. This Petition should be granted to review this issue, which appears to be a matter of first impression for the United States Supreme Court. Namely, this Petition should be granted so this Court can determine if it is proper to award "exceptional case" attorney fees under §285 of the Patent Act for work previously claimed to be associated with a reversed antitrust claim.

II. "EXCEPTIONAL CASE" ATTORNEY FEES UNDER 35 U.S.C. §285 SHOULD ONLY BE AWARDED WITH FINDINGS OF BAD FAITH, DELIBERATE FRAUD, OR DECEPTIVE INTENT

The Federal Circuit has held that there is no *per se* rule of exceptionality in cases involving inequitable conduct. *Nilssen v. Osram Sylvania, Inc.*, 528 F.3d 1352, 1358 (Fed. Cir. 2008). That is,

the Federal Circuit recognizes "that a finding of inequitable conduct does not always warrant the award of attorney fees." *Id. at 1363 (Newman, J., dissenting).*

In the past, the Federal Circuit has required district courts to determine whether a minimum threshold level of bad faith, deliberate fraud, or deceptive intent exists before awarding attorney fees under 35 U.S.C. §285. *Nilssen, id. at* 1363-64 (Newman, J., dissenting)(collecting cases); *J.P. Stevens Co., Inc. v. Lex Tex Ltd., Inc.*, 822 F.2d 1047, 1052-53 (Fed. Cir. 1987)(affirming denial of fees because no deliberate fraud or deceptive intent); *Gardco Mfg., Inc. v. Herst Lighting Co.*, 820 F.2d 1209, 1215 (Fed. Cir. 1987)(affirming denial of fees where no evidence that patentee acted in "bad faith or intentionally misled the PTO"); *Arbrook, Inc. v. Am. Hosp. Supply Corp.*, 645 F.2d 273, 279 (5th Cir. 1981)(patent applicant that fails to disclose relevant prior art runs the risk of invalidation of patent, but he is not liable for fees under §285 unless he is guilty of deliberate misrepresentations or concealment.").

As noted in the dissenting opinion of *Nilssen*, however, recent decisions from the Federal Circuit have begun to diverge from the analysis advocated in earlier Federal Circuit precedent. These earlier decisions required an analysis of the nature of the inequitable conduct and the intent of the patent holder before an award of attorney fees could be supported by 35 U.S.C. §285. As stated by Judge Newman in the *Nilssen* dissenting opinion, the "[p]anel majority departs from precedent in holding that the nature of the 'inequitable conduct' is not a

factor to be weighed in the attorney fee determination." *Id. at* 1364. The determination of the Federal Circuit in the present case (affirmed without opinion) adds another case to the recent divergence in Federal Circuit precedent regarding the need to make intent findings in order to support an attorney fees award under §285.

The Federal Circuit's previous precedent found that intent is analyzed in a "hierarchy of misconduct," which is set forth as follows:

> (1) misconduct which makes a patent unenforceable (which [the Court has] termed "inequitable conduct); (2) misconduct which is sufficient to make a case "exceptional" under 35 U.S.C. §285 so as to warrant . . . an award of attorney fees, and (3) misconduct which rises to the level of common law fraud and which will support an antitrust claim.

Argus Chem. Corp. v. Fibre Glass-Evercoat Co., 812 F.2d 1381, 1387 (Fed. Cir. 1987)(Nies, J., concurring). The Federal Circuit in the first appeal of the present case analyzed the intent elements and acknowledged that the "difference in breadth between inequitable conduct and *Walker Process* fraud admits the possibility of a close case whose facts reach the level of inequitable conduct, but not of fraud before the PTO." *DDI v. Mosey,* 476 F.3d at 1347, App. 50a.

After the Federal Circuit, in the first appeal, analyzed the intent findings in the present case, it determined that there was insufficient bad faith intent to support the antitrust claims. *Id. at App. 49a-55a.* Namely, the Federal Circuit reversed the

district court's antitrust findings because there was not a sufficient showing of the requisite level of bad faith intent needed to support an antitrust violation. *Id.* The Federal Circuit also found that this was not a case involving "highly egregious" bad faith conduct, there had been no false misrepresentations made by the Plaintiff to the Patent Office, and there was no direct evidence of any bad faith intent exhibited by the Plaintiff. *Id. at 48a (note 4), 51a (statement not false, statement was true), 52a (defendants submitted no intent evidence).*

In the first appeal, the Federal Circuit stated as follows:

> The district court characterized DDI's intent to deceive as "of a high nature." We disagree, but believe that in light of the high materiality of the nondisclosure, inequitable conduct can still be found here even though the evidence reveals less than an egregiously willful intent to deceive.

Id. at App. 48a, note 4. The Federal Circuit affirmed the inequitable conduct findings based on an "inference" of bad faith intent arising from the high "materiality" of the undisclosed prior art sales. The Federal Circuit remanded the present case to the district court with instructions to determine whether the case was exceptional in light of the Federal Circuit's opinions expressed in the first appeal, *DDI v. Mosey*, which should have included a review of the "intent" ruling from the Federal Circuit.

The district court's §285 analysis on remand in the present case, like the divergent analysis described by the *Nilssen* dissenting opinion, failed to

properly account for the alleged nature of the misconduct or make any findings regarding a minimum threshold level of bad faith intent on the part of the patent holder in light of the Federal Circuit's rulings. Upon remand, the district court recognized the reversal of the district court's prior findings of bad faith by the U.S. Court of Appeals for the Federal Circuit, but the district court reinstated the $2.6 million attorney fees award previously vacated by the Federal Circuit under 35 U.S.C. §285 using only the district court's prior analysis of the case and because the district court still viewed the Plaintiff's conduct as egregious and improper – which are findings that were significantly altered by the Federal Circuit's rulings.

The district court found the case exceptional based on the district court's prior rulings and findings without analyzing the impact of the reversal of the bad faith intent rulings by the Federal Circuit or the impact of the other Federal Circuit's rulings on the "intent" analysis. In addition to this reinstatement of fees, the district court increased the attorney fees award by an additional $1.2 million and $400,000.00 in costs based only on the district court's prior analysis of exceptional case circumstances.

Two important facts should be emphasized in the present Petition. First, on the last day of the trial at a Rule 50 Motion hearing in 2003, the district

court judge indicated that he did not agree with the jury's finding of intent to withhold material prior art with respect to Mr. Jones as follows:

> With respect to number 6, the only evidence in the record, as I see it, with respect to Mr. Jones' intent is the fact that in his declaration, he did not disclose sales that clearly occurred prior to March of 1988. The jury apparently drew the inference from that, that there was intent to deceive.
>
> That's, I believe, the jury's prerogative. It's not necessarily the inference that I would have drawn from the evidence, but again, I think it's a classic jury issue, and I'm not going to overrule the decision by the jury with respect to Mr. Jones' intent.

Transcript, Rule 50 Motion Hearing, App. 3a. With respect to the prosecuting attorney, the district court found that the requisite intent was shown by his alleged material misrepresentations to the U.S. Patent & Trademark Office, in addition to the omission of the material references – which are rulings that were significantly affected by the Federal Circuit's opinion in the first appeal, *DDI v. Mosey,* 476 F.3d at 1346-1348, *App. 46a-55a.*

It should also be noted that the district court's prior exceptional case analysis in 2005 determined that the "other factors" in the inequitable conduct analysis favored denial of the attorney fees award under the Patent Act. *Aug. 4, 2005 Order, App. 21a.* The district court considered these "other factors" in the exceptional case analysis (e.g. closeness of the case, tactics of counsel, conduct of the parties), but the district court explicitly indicated that "[n]one of

these factors [were] sufficient to overcome the jury's findings of fraud on the Patent Office." *Id. at 21a.* This district court finding explicitly indicates that these other factors weigh in favor of the Plaintiff and favor denial of the attorney fees award. *Id.* With all other factors weighing in favor of denial of attorney fees, the only basis for the exceptional case finding in 2007 was the district court's view about "egregious" bad faith conduct and alleged misrepresentations to the Patent Office, which the Federal Circuit had found did not exist in the present case in its opinion on the first appeal. *DDI v. Mosey,* 476 F.3d 1346-1348, *App. 46a-55a (note 4), 51a (no false statement), 52a (no direct evidence of bad faith intent).*

Even though the Federal Circuit had found no egregious bad faith conduct and even though the district court acknowledged its own disagreement with the jury findings of bad faith intent on the part of the patentee, the district court indicated on remand that the present case was "exceptional" based on the prior reasoning set forth in the 2005 orders and based on DDI's "inequitable, and in my view egregious, conduct before the PTO." *Id. at App. 62a.* According to the district court in the 2007 Order, DDI's "conduct before the Patent Office was inappropriate and, in my judgment, outrageous enough to warrant attorney fees." *Id. at App. 67a.* The Federal Circuit, however, had explicitly indicated that those intent findings were no longer valid and that the Federal Circuit disagreed with the district court's determinations regarding bad faith intent or the alleged "high degree" of egregious bad faith.

The Petitioner appealed the district court's 2007 decision that reinstated and increased the attorney fees award to the U.S. Court of Appeals to the Federal Circuit. The Federal Circuit affirmed the district court's §285 attorney fees award without opinion and without any further analysis of the patent holder's bad faith intent or lack thereof. The Petitioner subsequently filed a Petition for Rehearing and Rehearing En Banc, which was denied. By affirming the district court's decision without opinion, the Federal Circuit's positions in this appeal match those of the majority panel in *Nilssen v. Osram*, which diverge from prior Federal Circuit precedent requiring a determination as to whether there exists a minimum threshold level of intent necessary to support an award of attorney fees under 35 U.S.C. §285.

This Petition for Writ of Certiorari requests this Court's review of the $3.8 million attorney fees awards under §285 because the district court failed to properly analyze whether a minimum threshold level of intent was found to be present in this case. By not considering the new landscape in this case surrounding "intent" findings as set forth by the Federal Circuit's rulings in the first appeal, the district court abused its discretion when it awarded $3.8 million in attorney fees under 35 U.S.C. §285. The Petitioner respectfully requests that this Petition be granted to determine whether an award of attorney fees under 35 U.S.C. §285 is proper in the present case because a sufficient review of the intent evidence was not conducted, the Federal Circuit has indicated that this case is not one involving highly egregious bad faith, there is no direct evidence of bad

faith intent, and there are no material misrepresentations to the Patent Office.

III. THERE WAS AN IMPROPER "TAKING" WITHOUT DUE PROCESS BY THE DISTRICT COURT'S FAILURE TO FULLY CONSIDER THE STATUS OF THE PREVAILING PARTIES AND THE OTHER CONSIDERATIONS UNDER §285 OF THE PATENT ACT

The Fifth Amendment to the United States Constitution provides that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution, Bill of Rights, Fifth Amendment. The Fifth Amendment prevents individuals from being punished without "due process of law," and the due process rights under this Amendment extend to all persons and corporate entities. *United States v. Unimex*, 991 F.2d 546 (1993) (court action violated Fifth Amendment). The Fifth Amendment applies to the federal government actions. *Barron v. Baltimore*, 7 Pet. 243 (1833).

The Takings Clause of the Fifth Amendment applies not only when the government exercises its power of eminent domain to take ownership of private property, but also when government action works to destroy an owner's property right or denies the owner any economically viable use of his property. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922); *Dolan v. City of Tigard*, 512

U.S. 374, 383-396 (1994). The constitution protects private property owners not only from legislative and administrative actions that deprive them of their property without just compensation, but also from judicial actions that amount to such takings. *See, id. at* 298. "No more by judicial decree than by legislative fiat" may private property be taken without due process and just compensation. *Stevens v. City of Cannon Beach,* 510 U.S. 1207 (1994) (Scalia, J., dissenting from denial of petition for writ of certiorari). Such judicial actions may include an unexpected departure from long-standing judicial precedent. *See Robinson v. Ariyoshi,* 441 F. Supp. 559 (D. Hawaii 1997), *aff'd in relevant part,* 753 F.2d 1468 (9th Cir. 1985), *vacated on other grounds,* 475 U.S. 902 (1986).

Because the district court's attorney fees award (and the Federal Circuit's decision to affirm the award) rejected long-standing precedent that required the analysis of intent before a §285 attorney fees award may be granted, this Petition requests review of a $3.8 million attorney fees award issued in 2007 under §285 of the Unites States Patent Act, including whether the district court's analysis (or lack of analysis) was a "taking" of the Plaintiff's property and monetary interests in violation of the Fifth Amendment to the United States Constitution.

Namely, the district court analysis of the §285 attorney fees request should have included consideration of the Plaintiff as a prevailing party in the antitrust claims, the Federal Circuit's rulings regarding no highly egregious bad faith conduct on the part of the Plaintiff, no material

misrepresentations by the Plaintiff to the Patent Office, and no direct evidence of bad faith intent, and the district court's findings that the "other factors" in the exceptional case analysis weighed in favor of denial of the attorney fees award.

It is respectfully requested that this Petition be granted to address whether the failure of the district court to conduct the proper analysis and consider the appropriate factors has deprived the Petitioner of property without due process in violation of the Fifth Amendment to the United States Constitution.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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Attorney for Petitioner

APPENDIX A

OPINIONS BELOW

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.)	DOCKET NO.
)	3:96-cv-1959-X (TX)
Plaintiffs,)	
)	
v.)	
)	DALLAS TEXAS
THOMAS R.MOSEY, et al.)	OCTOBER 20, 2003
)	
Defendants.)	

TRANSCRIPT OF HEARING ON RULE 50 MOTIONS BEFORE HONORABLE JUDGE THOMAS W. TRASH, JR., UNITED STATED DISTRICT COURT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:	MICHAEL J. BOWERS CHRISTOPHER R. ANULEWICZ D. SCOTT HEMINGWAY TODD E. STOCKWELL J. W. SEANOR ATTORNEYS AT LAW
FOR THE DEFENDANTS:	ROBERT G. WAKE, JR. RUDOLF O. SIEGESMUND

JOHN P. FRY
KEITH E. BROYLES
MATTHEW J. PULLIAM
ATTORNEYS AT LAW

COURT REPORTER: LINDA W. BAGGETT
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30303-3361
(404) 215-1558

PROCEEDING RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED BY COMPUTER

LINDA W. BAGGETT. RDR. CRR

(From the proceedings October 20, 2003, Dallas, Texas, Open Court)

The Court: All right, gentlemen. I think I have two motions for judgment as a matter of side wish to present any additional argument on that law on obviousness that I took under advisement. Either issue?

Mr. Bowers: Yes, your honor, please:

The Court: All right, Mr. Bowers.

Mr. Bowers: Thank you, very much, your honor.

(Tr. P. 2)

* * *

With respect to questions 5 and 6 and 7, the alleged misrepresentations in the evidence presented by the defendants were two, as I recall the evidence: one is that the sales of the product produced by the method claimed in the patent, first sales were in March of 1988. The other alleged misrepresentation

was that the method claimed in the patent was the first to produce a free-flowing product to be served directly for consumption. As I commented in response to Mr. Bowers' argument, positions got reversed here during the trial of the case, for what appear to me to be tactical reasons, but clearly, whether not the product had been sold direct to consumers in a free-flowing state became the critical issue on -- in the dialogue between Mr. Jones and Mr. Schickli and the examiner, and that it was the fact that commercial success had been shown due to serving a free-flowing product direct to consumers. That was what finally convinced the examiner to issue the patent, as I view the evidence in the case. And, therefore, the jury's finding that the misrepresentations or omissions were material, I think, is supported by evidence in the record, and I'm going to deny the motion as to question number -- the answer to question number 5.

With respect to number 6, the only evidence in the record, as I see it, with respect to Mr. Jones' intent is the fact that in his declaration, he did not disclose sales that clearly occurred prior to March of 1988. The jury apparently drew the inference from that, that there was intent to deceive.

That's, I believe, the jury's prerogative. It's not necessarily the inference that I would have drawn from the evidence, but again, I think it's a classic jury issue, and I'm not going to overrule the decision by the jury with respect to Mr. Jones' intent.

With respect to Mr. Schickli's intent, I think the grounds for drawing the inference, frankly, are much greater and stronger. And if there was a misrepresentation by either Mr. Jones or Mr. Schickli, the jury's decision as to question 6 is

supported by the evidence. So I'm going to deny the Rule 50 Motion on patent invalidity and fraud on the patent office for those reasons.

All right. The other issue that I took under advisement is the issue of inequitable conduct. I'm less sure that I want to decide that motion today. In fact my preference would be to get briefs from the parties as to exactly what the standard is, what the burdens are, and your view of the evidence in light of the jury verdict. What do you say, Mr. Bowers?

Mr. Bowers: We would like that, and we would appreciate that opportunity, your honor.

The Court: Mr. Oake?

Mr. Oake: Yes, your honor, we would be happy to do that.

Mr. Fry: Yes, your honor. Thank you.

(Tr. P. 9-10)

***

(Trial concluded at 4:52.)

Reporter's Certification

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Linda W. Baddgett

LINDA W. BAGGETT
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

Date: 8/30/04

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.	§	
	§	
Plaintiffs,	§	
v.	§	
	§	CIVIL ACTION FILE
THOMAS R.MOSEY, et al.	§	NO.3:96-cv-1959-L
	§	
Defendants.	§	

ORDER

This is an action for patent and trademark infringement. At trial, the Defendant Frosty Bites Distribution, LLC ("Frosty Bites Distribution") prevailed on its antitrust counterclaim. The cāse is now before the Court on the Defendant's Motion for Attorney Fees and Costs Under the Clayton Act [Doc. 849]. For the reasons set forth below, the motion is granted, and Frosty Bites Distribution is awarded $676,675.46 in attorneys' fees and costs.

I. BACKGROUND

This action was filed by Plaintiffs Dippin' Dots, Inc. ("Dippin' Dots"), and its founder, Curt Jones. Dippin' Dots is an Illinois corporation with its principal place of business in Paducah, Kentucky. Dippin' Dots is engaged in the business of manufacturing and distributing flesh frozen novelty ice cream. The Defendants in this action are engaged in either the manufacture ("Manufacturing Parties") or distribution ("Distribution Parties") of a

competing flash frozen novelty ice cream product known as Frosty Bites.

As part of their response to the Plaintiffs' claims, the Distribution Parties filed antitrust counterclaims against the Plaintiffs. The Distribution Parties brought their antitrust claims based on the theory of Walker Process fraud. In October 2003, a jury trial was held in this case. The jury found for Frosty Bites Distribution on every element of antitrust counterclaim, although the jury awarded no monetary damages. (Jury Verdict, p. 3-4) Pursuant to the jury's findings, Frosty Bites Distribution filed this motion for attorneys' fees.

II. STANDARD

Section four of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor... and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). A violation of the antitrust law is, by itself, not enough to justify an award of attorneys' fees. Rather, and antitrust plaintiff must show that the violation of the antitrust laws caused an injury to its business or property, although the actual recovery of compensatory damages is not necessary. Sciambra v. Graham News, 892 F.2d 411, 415-16 (5th Cir. 1990). Once the antitrust plaintiff proves a violation of the antitrust laws and the fact of damage, an award for attorneys' fees and costs is mandatory. Id. at 414; 15 U.S.C. § 15(a).

III. DISCUSSION

In its verdict, the jury determined that Frosty Bites Distribution had proven all of the elements of its antitrust counterclaim, including the fact of damage. (Jury Verdict, p.3-4.) The Plaintiffs contend that Frosty Bites Distribution is not entitled to an award of attorneys' fees because the jury did not give the Defendants a monetary award. (Id. at 4.) However, whether the jury awarded monetary relief is not dispositive with respect to an award of attorneys' fees under the Clayton Act. Rather, the issue is whether the Plaintiffs' antitrust violations caused damage to the business or property of the Defendants. Sciambra, 892 F.2d at 415 ("Our holding merely recognizes that the structure of section 4 and the fact of damage analysis make the actual recovery of compensatory damages irrelevant"). The jury answered that specific question in the affirmative, entitling Frosty Bites Distribution to an award of attorneys' fees and costs of the suit. See also Kearney & Trecker Corp. v. Cincinnati Milacron, Inc., 562 F.2d 365,374 (6th Cir. 1977) (placing the defendant in the position of having to choose from ceasing competition, obtaining a license, or defending the suit, each of which would result in negative economic injury, is an injury to business or property).

The Plaintiffs also contend that Frosty Bites Distribution's motion should be denied or apportioned because the Court granted judgment as a matter of law against seventeen of twenty Distribution Parties in the litigation. This occurred because the other Distribution Parties did not appear at trial and presented no evidence to support any claims for relief. Frosty Bites Distribution, however,

is the only party seeking an award of attorneys' fees, and it was one of the parties which the jury determined was injured in business or property by the Plaintiffs' violations of the antitrust laws. Moreover, through indemnity agreements, Frosty Bites Distribution took on the entire defense of the Plaintiffs' action and prosecution of the antitrust counterclaim. Accordingly, Frosty Bites Distribution is the only party that incurred any attorneys' fees and costs with respect to the antitrust claims. Finally, even if the indemnity agreements were not in place, Frosty Bites Distribution would have had to incur the fees and costs it now seeks for its own prosecution of the antitrust counterclaim. The fact that not all the Distribution Parties' claims went to the jury is not relevant to Frosty Bites Distribution's claim for the fees and costs it incurred in prosecuting the antitrust counterclaim against the Plaintiffs. Because Frosty Bites Distribution showed it suffered damage to its business or property by the Plaintiffs' violations of the antitrust laws, it is entitled to an award of reasonable attorneys' fees and costs.

Once the Court has determined that an award of attorneys' fees is proper, it must then determine what that award should be. The determination of reasonable attorneys' fees is a two step procedure under prevailing Fifth Circuit caselaw. First, the Court must determine the reasonable number of hours expended on the litigation, and the reasonable hourly rates for the services rendered. Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 324 (5th Cir. 1995). Next, the Court must multiply the reasonable hours by the reasonable rates. Id. "The product of this multiplication is the lodestar, which the district court then either accepts or adjusts

upward or downward, depending on the circumstances of the case." Id.

With respect to the reasonable numbers of hours spent on the litigation, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." Id. at 324. The documentation should be such that this Court cannot only determine whether the total hours claimed is reasonable, but also, whether particular hours claimed were reasonable expended. Id. at 325. Frosty Bites Distribution filed a Detailed Specification and Itemization of the Requested Clayton Act Attorneys' Fee Award [Doc. 873] ("Specification") in which it sets out the number or hours expended on this litigation, and the claims to which those hours were directed. The Specification summarizes the hours expended by the attorneys and staff that worked on this case, and then lists each of the billable hour entries for this litigation, beginning on April 1, 2003.[1] Below each billable hour entry is a detailed description of the work which was preformed on the case during the time period. In listing the billable hour entries for this case, the Specification identifies those hours which were spent on matters unrelated to the antitrust counterclaim, and does not include those hours in Frosty Bites Distribution's calculation of reasonable hours expended. (Specification, Tab. A, 1, (entries marked with "Ø").) The Specification also identifies those hours which were split between the antitrust counterclaim and other, unrelated matters, and for those entries, only half of the hours are

[1] Frosty Bites Distribution indicated that although some work was done on the antitrust counterclaim prior to April 1, 2003, those hours are not included in the request for attorneys' fees.

included in Frosty Bites Distribution's calculation of reasonable hours expanded. (Specification, Tab. A, 1, (entries marked with "Sp.").) Having carefully reviewed Frosty Bites Distribution's Specification, including the summaries, detailed billable hour entries, and supporting affidavits, this Court finds that the hours claimed were reasonable, especially considering the complexity and length of this litigation. The Plaintiffs have not asserted specific objections to any of the hours claimed as being unnecessary, redundant or lacking in billing judgment.

As for determining the reasonable rate to be charged for the services rendered, the Court is to consider the "attorneys' regular rates as well as the prevailing rates." Louisiana Power & Light, 50 F.3d at 328. When the rates requested by the attorneys are their regular rates, are within the range of prevailing market rates, and are not contested, such rates are "prima facie reasonable." Id. Frosty Bites Distribution produced evidence that their attorneys' regular rates fell within the range of prevailing market rates, and the Plaintiffs did not contest that issue. (Specification, Tab B, Table 17b.) Given that such rates are "prima facie reasonable" and seeing no reason to adjust them, especially considering the complexity and length of this litigation, this Court determinates that the rates requested by Frosty Bites Distribution in the Specification are the reasonable rates for the services rendered for prosecuting the antitrust counterclaim.

Having determined that the hours and rates requested by Frosty Bites Distribution are reasonable, the remaining step is to multiply the reasonable hours by the reasonable rates to come up with the reasonable attorneys' fee award. When the

hours are multiplied by the appropriate rate, depending on the attorney billing the hours, and those products are added together, the total comes to \$649,898.39. Frosty Bites Distribution is also entitled by statute to costs of the case, which total \$26,777.07. (Specification, Tab. A, 1, p.4.) Thus, the Frosty Bites Distribution lodestar amount is \$676,675.46.

After calculating the reasonable award of attorneys' fees and costs, a district court may consider adjustment of the lodestar based on the twelve factors from Johnson v. Georgia Highway Exp., Inc., 488 F.2d 714, 717-19 (1974). The party advocating and adjustment has the burden to prove such is warranted. Louisiana Power & Light, 50 F.3d at 329. In this case, however, neither party sought an adjustment of the lodestar – Frosty Bites Distribution did not request and upward adjustment, and the Plaintiffs did not request a downward adjustment. Since neither party sought an adjustment to the lodestar, there is no reason for this Court to undertake an evaluation of the Johnson factors.

IV. CONCLUSION

For the reasons set forth above, Frosty Bites Distribution's Motion for Attorney Fees and Costs Under the Clayton Act [Doc. 849] is GRANTED. The Clerk is directed to enter a judgment in favor of the Defendant Frosty Bites Distribution and against the Plaintiffs in the sum of \$676,675.46 with post judgment interest from October 20, 2003.

SO ORDERED, this 3 day of June, 2004.

s/Thomas W. Trash,Jr.
THOMAS W. TRASH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.	§
	§
Plaintiffs,	§
	§
v.	§
	§ CIVIL ACTION FILE
THOMAS R.MOSEY, et al.	§ NO.3:96-cv-1959-L
	§ (consolidated with
Defendants.	§ 3:01-CV-1532-L

FINAL JUDGMENT

These are related actions brought by the Plaintiffs for patent infringement pursuant to the Patent Act (35 U.S.C. § 100 et seq.), trade dress and trademark infringement pursuant to the Lanham Act (15 U.S.C. § 1125), alleged violations of the Uniform Trade Secrets (18 U.S.C. § 1905), and various state statutory and common law causes of action, as well as counterclaims brought by the Defendants for a declaration that Plaintiffs' patent is invalid, unenforceable, not infringed, that the Plaintiffs violated the antitrust laws of the United States, and various state common law causes of action.

This action was filed by Plaintiffs Dippin' Dots, Inc. and its founder, Curt Jones ("Jones") (collectively, "DDI"). DDI is engaged in the business of manufacturing and distribution flash frozen novelty ice cream. The Defendants in this action are corporations and individuals engaged in the

manufacture, distribution or sale of competing flash frozen novelty ice cream products known as Frosty Bites and Mini Melts. Jones, the Dippin' Dots founder, applied for and received United States Patent No. 5,126,156 ("the '156 patent") for the method DDI uses to make a flash frozen ice cream.

In 1996, DDI sued Defendants Thomas R. Mosey ("Mosey") and International Laser Expressions, Inc., doing business as Dots of Fun ("ILE") in Dallas, Texas in Cause of Action 3:96-CV-1959-L (the "1959 Case"). In 1998, DDI amended the complaint to include Dots of Fun, Ltd. ("DOF") and Nicholas Angus ("Angus"). Beginning in April 2000, DDI filed a series of lawsuits against former DDI dealers and distributors around the country alleging numerous causes of action. At that time, DDI also amended its complaint in the 1959 Case, adding Frosty Bites, Inc., which later because known as Mini Melts, Inc. ("Mini Melts"), to the litigation. (Mosey, ILE, DOF, Angus, and Mini Melts are hereafter referred to as the "Mosey Parties"). In 2000, DDI also added F. Robert Esty, Jr., Frosty Bites Retail of Florida, Inc., Barry Jay Bass, Julia Ann Bass, Jack Miller, James Perez, Jeanine Matone, Victor Bauer, Daniel Kilcoyne, Shawn P. Kilcoyne, Daniel Dopko, Edmund Abramson, and Frosty Bites Distribution, LLC (the "Distribution Parties") as defendants to the patent litigation. Following this addition, Frosty Bites Distribution of Florida, Inc., Frosty Bites Distribution of Georgia, Inc., Frosty Bites of Michigan, Inc., J&J Concessions of New Jersey, Inc., Frosty Bites of New York, LLC, Frosty Bites Ice Cream Development, LLC, and Frosty Bites Ice Cream Co., LLC (the "Intervenors") all intervened in the Texas Case DDI filed against the Mosey Parties. In early 2001, all of these cases

were transferred to the Northern District of Georgia by the Judicial Panel on Multidistrict Litigation for consolidation (the "MDL Litigation").[1]

In August 2001, the Mosey Parties filed suit in Dallas, Texas (Civil Action No. 3-01-CV-1532-M (the "1532 Case")) against DDI seeking declaratory judgment that they had not misappropriated any trade secrets or infringed any enforceable trade dress rights, to which DDI counterclaimed for misappropriation of trade secrets, statutory and common law trademark and trade dress infringement, and various state law unfair competition causes of action. The 1532 Case was later consolidated with the 1959 Case. All claims other than Defendants' claims for attorneys' fees having been resolved by summary judgment, jury trial or voluntary dismissal,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is rendered in favor of the Defendants as follows:

1. With regard to the Frosty Bites product, the Defendants do not infringe United States Patent No. 5,126,156, either literally or under the doctrine of equivalents;
2. DDI's putative trade secrets are not protected by the Uniform Trade Secrets Act under Kentucky law;

[1] The MDL Litigation consisted on eight related actions. In five of those cases, DDI sued various Frosty Bites manufacturers and distributors for patent infringement, trademark and trade dress infringement, misappropriation of trade secrets, and breach of contract. The other three actions, were brought by Frosty Bites' manufacturers and distributors seeking a declaratory judgment that the '156 patent is invalid and unenforceable.

3. The Defendants did not violate the Uniform Trade Secrets Act;
4. The Mosey Parties did not infringe DDI's alleged trade dress;
5. The Mosey Parties did not infringe DDI's trademark(s);
6. The Frosty Bites product and the method to make the Frosty Bites product do not infringe United States Patent No. 5,126,156;
7. The Defendants' sham litigation claims are dismissed with prejudice;
8. Curt Jones' sales cryogenically frozen ice cream before March 6, 1988, are prior art to the '156 patent;
9. All of the claims of the '156 patent are invalid and obvious;
10. The relevant market in this case is the manufacture of and sale of cryogenically frozen pieces of ice cream in the United States;
11. DDI possessed monopoly power in the relevant market;
12. DDI willfully acquired or maintained this monopoly power through restrictive or exclusionary conduct;
13. DDI's conduct occurred in or affected interstate commerce;
14. DDI's monopolization of the relevant market directly and proximately caused damage to the business or property of the Defendants;
15. The actual damages of Mini Melts Inc. f/k/a Frosty Bites, Inc. were $0 (none);
16. The actual damages Frosty Bites, Distribution were $0 (none);
17. The '156 patent is unenforceable due to inequitable conduct during the prosecution of

the patent before the United States Patent and Trademark Office; and

18. All of DDI's and Defendants' state law claims that were to be tried in the second trial are dismissed with prejudice, and each party shall bear its own costs with respect to those claims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that:

1. The preliminary injunction entered on March 31, 1997 is dissolved;
2. Frosty Bites Distribution is entitled to $676,675.46 in attorney's fees and costs under the Clayton Act; and
3. Dippin' Dots, Inc. and Curt Jones shall pay the Defendants' costs on all claims other than the dismissed state law claims.

SO ORDERED, this 18 day of February, 2005.

/s/ Thomas W. Trash
THOMAS W. TRASH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	CIVIL ACTION FILE
THOMAS R.MOSEY, et al.	§	NO.3:96-cv-1959-L
	§	
Defendants.	§	

OPINION AND ORDER

This is an action for patent infringement. At trial, the Defendant Frosty Bites Distribution, LLC ("Frosty Bites Distribution") prevailed on its antitrust counterclaim which necessary required a finding of patent invalidity. The case is now before the Court on the Defendant's Motion for Attorney Fees and Costs under the §285 of the Patent Act [Doc. 923]. For the reasons set forth below, the motion is granted in part and denied in part. Frosty Bites Distribution is awarded an additional $253,898.06 in attorneys' fees and costs under the Patent Act.

I. BACKGROUND

This action was filed by Plaintiffs Dippin' Dots, Inc. ("Dippin' Dots"), and its founder, Curt Jones. Dippin' Dots is an Illinois corporation with its principal place of business in Paducah, Kentucky.

Dippin' Dots is engaged in the business of manufacturing and distributing flash frozen novelty ice cream. The Defendants in this action are engaged in either the manufacture or distribution of a competing flash frozen novelty ice cream product known as Frosty Bites.

Jones filed his patent application in 1989. In 1987, Jones sold a free flowing, flash frozen ice cream product to consumers at the Festival Market Mall in Paducah, Kentucky. Jones did not disclose those sales to the Patent Office while prosecuting his patent. Evidence produced at trial showed that Jones and his attorney, Warren Schickli, argued to the Patent Office that Jones' method as described in the '156 patent application was the first to teach service of a flash frozen ice cream product while maintaining its free flowing quality. (Def.'s Trial Ex. 3, p. P0131-2.) The patent examiner agreed that no references in the disclosed prior art taught service of a free flowing flash frozen product. Nevertheless, the examiner rejected Jones' application, on the grounds that serving the product in a free flowing state was obvious based on the prior art and the nature of the product being served. (Def.'s Trial Ex. 3, p. P0137-8.) In the end, however, based on objective evidence of commercial success, the Plaintiffs overcame the examiner's obviousness objection, and United States Patent No. 5,126,156 ("the '156 patent") was issued. In getting the patent issued, Jones and Schickli made statements that were false in light of the evidence presented at trial about the Festival Market sales.

The Plaintiffs alleged that the Defendants' Frosty Bites product infringed the '156 patent. The Defendants denied infringement and alleged that the patent was invalid. In ruling upon the Defendants'

Motions for Summary Judgment, the Court held that the Defendants' process did not infringe upon the Plaintiffs' patent because Defendants streamed their solution. Therefore, the dripping limitation of the '156 patent was not literally infringed. The Court also held that the Defendants do not literally infringe the '156 patent because their process produces a mixture of beads and irregularly shaped flash frozen ice cream. Finally, the Court held that there was no infringement under the doctrine of equivalents. As part of their response to the Plaintiffs' claims, the Distribution Parties filed antitrust counterclaims against the Plaintiffs. The Distribution Parties brought their antitrust claims based on the theory of Walker Process fraud. The Court held that there were issues of fact to be tried with respect to the Defendants' antitrust counterclaims and the invalidity claims.

In October 2003, a jury trial was held in this case. The jury returned a verdict in favor of the Defendants on their invalidity claims. The jury also found in favor of the Defendants on every element of their antitrust counterclaims, although the jury awarded no monetary damages. (Jury Verdict, p. 3-4.) Pursuant to the jury's findings, the Court held that the patent was invalid for inequitable conduct.

II. DISCUSSION

Frosty Bites Distribution seeks an award of attorney's fees under 35 U.S.C. § 285. The statute provides for such an award to the prevailing party "in exceptional cases." 35 U.S.C. § 285. Exceptional cases are normally those of bad faith litigation or those involving fraud or inequitable conduct by the patentee in procuring the patent. Zodiac Pool Care,

Inc. v. Hoffinger Industries, Inc.,206 F.3d 1408, 1417 (Fed. Cir. 2000); Cambrige Prods., Ltd. v. Penn. Nutrients, Inc., 962 F.2d 1048, 1050-51 (Fed. Cir. 1992). The jury's finding that Jones and his attorney committed fraud on the Patent Office compels a finding that this is an exceptional case which warrants an award of attorney's fees. The Court has considered "the closeness of the case, the tactics of counsel, the conduct of parties, and any other factors that may contribute to a fair allocation of the burdens of litigation as between winner and loser." S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc., 781 F.2d 198, 201 (Fed. Cir. 1986). None of those factors are sufficient to overcome the jury's finding of fraud on the Patent Office.

An award of attorney's fees must be reasonable. Duplicative fees are not reasonable. The Court has previously awarded the Frosty Bites Distribution Defendants fees in the amount of $676,675.46 under the Clayton Act. The Defendants have not persuaded the Court that the current fee request does not duplicate at least in part the prior fee request. In their Reply Brief, the Defendants state that the vast majority of Alston & Bird's time after March 31, 2003, was spent on the antitrust claim. The Court has already awarded fees for that work. Therefore, the Court will grant the current motion only as to the $253,898.06 in fees for Arter & Hadden and Anderson, Kill & Olick.

III. CONCLUSION

The Defendant's Motion for Attorney Fees and Costs Under the Patent Act [Doc. 923] is GRANTED IN PART AND DENIED IN PART. It is GRANTED

in the amount of $253,898.06. It is otherwise DENIED.

SO ORDERED, this 4 day of August, 2005.

/s/ *Thomas W. Trash*
Thomas W. Trash, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	CIVIL ACTION FILE
THOMAS R.MOSEY, et al.	§	NO.3:96-cv-1959-L
	§	
Defendants.	§	

ORDER AND OPINION

This is an action for patent infringement. Following a jury trial on the issue of invalidity, it is before the Court on Manufacturing Parties' Motion for Attorneys' Fees under the Clayton Act [Doc.936]. For the reasons set forth below, the motion is granted.

I. BACKGROUND

This action was filed by Plaintiffs Dippin' Dots, Inc. ("Dippin' Dots"), and its founder, Curt Jones. Dippin' Dots is an Illinois corporation with its principal place of business in Paducah, Kentucky. Dippin' Dots is engaged in business of manufacturing and distributing flash frozen novelty ice cream. The Defendants in this action are engaged in either the manufacture ("Manufacturing Parties") or Distribution ("Distribution Parties") of a competing flash frozen novelty ice cream product known as Frosty Bites.

As part of their response to the Plaintiffs' claims, the Manufacturing Parties filed antitrust counterclaims against the Plaintiffs. The Manufacturing Parties brought their antitrust claims based on the theory of Walker Process fraud. In October 2003, a jury trial was held in this case. The jury found for Manufacturing Parties on every element of the antitrust counterclaim, although the jury awarded no monetary damages. (Jury Verdict, p. 3-4.) Pursuant to the jury's findings, the Manufacturing Parties filed this motion for attorneys' fees.

II. STANDARD

Section four of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor ...and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." 15 U.S.C. § 15(a). A violation of the antitrust laws is, by itself, not enough to justify an award of attorneys' fees. Rather, an antitrust plaintiff must show that the violation of the antitrust laws caused an injury to its business or property, although the actual recovery of compensatory damages is not necessary. Sciambra v. Graham News, 892 F.2d 411, 415-16 (5th Cir. 1990). Once the antitrust plaintiff proves a violation of the antitrust laws and the fact of damage, an award for attorneys' fees and costs is mandatory. Id. at 414; 15 U.S.C. § 15(a).

III. DISCUSSION

In its verdict, the jury determined that the Manufacturing Parties had proven all of the elements of their antitrust counterclaim, including the fact of damage. (Jury Verdict, p. 3-4.) The Plaintiffs contend that the Manufacturing Parties are not entitled to an award of attorneys' fees because the jury did not give the Defendants a monetary award. (Id. at 4.) However, whether the jury awarded monetary relief is not dispositive with respect to an award of attorneys' fees under the Clayton Act. Rather, the issue is whether the Plaintiffs' antitrust violations caused damage to the business or property of the Defendants. Sciambra, 892 F.2d at 415 ("Our holding merely recognizes that the structure of section 4 and the fact of damage analysis make the actual recovery of compensatory damages irrelevant"). The jury answered that specific question in the affirmative, entitling the Manufacturing Parties to an award of attorneys' fees and costs of the suit. See also Kearney v. Trecker Corp. v. Cincinnati Milacron Inc., 562 F.2d 365, 374 (6th Cir. 1977) (placing the defendant in the position of having to choose from ceasing competition, obtaining a license, or defending the suit, each of which would result in negative economic injury, is an injury to business or property).

The Plaintiffs contend that an award of attoneys' fees should be limited to the work attempting to prove an antitrust injury. However, proving the Walker Process counterclaim required establishing patent invalidity and fraud on the Patent Office. Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1070 (Fed. Cir. 1998) (patentee who brings an infringement suit may be subject to antitrust liability for the anti-competitive effects of that suit if the alleged infringer

proves that the asserted patent was obtained through "knowing and willful fraud"). This effort consumed the vast majority of attorney time for counsel for the Manufacturing Parties. The issues relating to infringement were so intertwined with the invalidity issues as to be inseparable. The Plaintiffs' argument is without merit.

Once the Court has determined that an award of attorneys' fees is proper, it must then determine what that award should be. The determination of reasonable attorneys' fees is a two step procedure under prevailing Fifth Circuit case law. First, the Court must determine the reasonable number of hours expended on the litigation, and the reasonable hourly rates for the services rendered. Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 324 (5th Cir. 1995). Next, the Court must multiply the reasonable hours by reasonable rates. Id. "The product of multiplication is the lodestar, which the district court then either accepts or adjusts upward or downward, depending on circumstances of the case." Id.

With respect to the reasonable numbers of hours spent on the litigation, "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended an hourly rates." Id. at 324. The documentation should be such that this Court cannot only determine whether the total hours claimed is reasonable, but also, whether particular hours claimed were reasonable expended. Id. at 325. Mr. Oake and Mr. Siegismund have submitted copies of their billing records and both have filed declarations which set out number of hours expended on this litigation and the claims to which those hours were directed. After careful review of the declarations and supporting

documents, this Court finds that the hours claimed were reasonable, especially considering the complexity and length of this litigation. The Plaintiffs have not asserted specific objections to any of the hours claimed as being unnecessary, redundant or lacking in billing judgment.

As for determining the reasonable rate to be charged for the services rendered, the Court is to consider the "attorneys' regular rates as well as the prevailing rates." Louisiana Power & Light , 50 R.3d at 328. When the rates requested by the attorneys are their regular rates, are within the range prevailing market rates, and are not contested, such rates are "prima facie reasonable." Id. Mr. Oake and Mr. Siegismund have shown that their regular rates fell within the range of prevailing market rates, and the Plaintiffs did not contest that issue. Given that such rates are "prima facie reasonable" and seeing no reason to adjust them, especially considering the complexity and length of this litigation, this Court determines that the rates requested by the Manufacturing Parties are the reasonable rates for the services rendered for prosecuting the antitrust counterclaim.

Having determined that the hours and rates requested by Frosty Bites Distribution are reasonable, the remaining step is to multiply the reasonable hours by the reasonable rates to come up with the reasonable attorneys' fee award. When the hours are multiplied by the appropriate rate, depending on the attorney billing the hours, and those products are added together, the total comes to $1,914,724.00.

After calculating the reasonable award of attorneys' fees and costs, a district court may consider adjustment of the lodestar based on the

twelve factors from Johnson v. Georgia Highway., Inc., 488 F.2d 714, 717-19 (1974). The party advocating an adjustment has the burden to prove that it is warranted. Louisiana Power & Light, 50 F.3d at 329. The Plaintiffs seek an adjustment to the lodestar based upon the failure of the jury to award any damages on the antitrust counterclaim. This is a reasonable and principled basis to seek an adjustment to the lodestar. On the other hand, the Manufacturing Parties also move for an award of attorneys' fees under the Patent Act. The Manufacturing Parties were totally victorious on their claims that the patent was invalid due to prior art, obviousness and inequitable conduct. There is no basis for a reduction of the lodestar as to the successful invalidity claims. Therefore, any reduction of the lodestar here would result in an award of the same amount under the motion seeking fees under the Patent Act.

IV. CONCLUSION

For the reasons set forth above, the Manufacturing Parties' Motion for Attorneys' Fees and Costs Under the Clayton Act [Doc. 936] is GRANTED. The Clerk is directed to enter a judgment in favor of the Manufacturing Parties and against the Plaintiffs in the sum of $1,914,724.00 with prejudgment interest from October 20, 2003.

SO ORDERED, this 4 day of August, 2005.

/s/ Thomas W. Trash
THOMAS W. TRASH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	CIVIL ACTION FILE
THOMAS R.MOSEY, et al.	§	NO.3:96-cv-1959-L
	§	
Defendants.	§	

ORDER

This is an action for patent infringement. Following a jury trial on issue of invalidity, it is before the Court on the Manufacturing Parties' Motion for Attorneys' Fees Under 35 U.S.C. § 285 [Doc. 934]. For the reasons stated in another Order, this is an exceptional case. However, the Manufacturing Parties have been awarded fees under the Clayton Act. An award of fees under the Patent Act would be duplicative and unreasonable. Therefore, the Manufacturing Parties' Motion for Attorneys' Fees Under U.S.C. § 285 [Doc. 934] is DENIED.

SO ORDERED, this 4 day of August, 2005.

/s/Thomas W. Trash
THOMAS W. TRASH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	CIVIL ACTION FILE
THOMAS R.MOSEY, et al.	§	NO.3:96-cv-1959-L
	§	
Defendants.	§	

ORDER

This is an action for patent infringement. Following a jury trial on the issue of invalidity, it is before the Court on the Manufacturing Parties' Motion for Reconsideration [Doc. 970] of the Court's Order denying the request for duplicative fees under the Patent Act. The Defendants have not shown that the Court committed clear error. The Manufacturing Parties' Motion for Reconsideration [Doc. 970] is DENIED.

SO ORDERED, this 13 day of October, 2005

/s/Thomas W. Trash
THOMAS W. TRASH, JR.
United States District Judge

United States Court of Appeals for the Federal Circuit

2005-1330, -1582
DIPPIN' DOTS, INC. and CURT D. JONES,
Plaintiffs-Appellants,
v.
THOMAS R. MOSEY, DOTS OF FUN,
INTERNATIONAL LASER EXPRESSIONS, INC.
(also known as I.L.E., Inc.),
Defendants-Cross Appellants,
and
NICHOLAS ANGUS,
Defendant/Counterclaimant-Cross Appellant,
and
FROSTY BITES DISTRIBUTION LLC,
Defendant-Appellee,
and
FROSTY BITES DISTRIBUTOR OF FLORIDA, INC.,
FROSTY BITES DISTRIBUTOR OF GEORGIA, INC.,
FROSTY BITES OF MICHIGAN, INC.,
J&J CONCESSIONS OF NEW JERSEY, INC.,
FROSTY BITES ICE CREAM COMPANY, LLC,
FROSTY BITES SOUTH, INC.,
INTERNATIONAL ASSOCIATION OF AMUSEMENT PARKS
AND ATTRACTIONS, FROSTY BITES OF NEW YORK, LLC,
and FROSTY BITES ICE CREAM DEVELOPMENT, LLC,
Defendants,
v.
F. ROBERT ESTY,

JR., BARRY JAY BASS,
VICTOR BAUER, JACK MILLER, DANIEL KILCOYNE,
SHAWN P. KILCOYNE, and DANIEL DOPKO,
N Counterclaim Defendants,
and
FROSTY BITES, INC.
(now known as Mini Melts, Inc.),
Counterclaim Defendant-Cross Appellant.

Daniel J. Warren, Sutherland Asbill & Brennan LLP, of Atlanta, Georgia, argued for plaintiffs-appellants, Dippin Dots, Inc. and Curtis D. Jones. With him on the brief were Candice C. Decaire, Erin C. Witkow, and Troy R. Covington. Of counsel was Todd Stockwell, Stockwell & Associates, of Lexington, Kentucky.
Robert G. Oake, Jr., Oake Law Office, of Allen, Texas, and Rudolf O. Siegesmund, Siegesmund & Associates, of Dallas, Texas, argued for defendants-cross-appellants Thomas R. Mosey et al., defendant/counterclaimant-cross appellant Nicholas Angus, and counterclaim defendant-cross appellant, Frosty Bites, Inc. (now known as Mini Melts, Inc.).
Keith E. Broyles, Alston & Bird LLP, of Atlanta, Georgia, argued for defendant-appellee. With him on the brief were Stacey A. Mollohan and William R. Hubbard.

Appealed from: United States District Court for the Northern District of Texas

Judge Thomas W. Thrash, Jr.

United States Court of Appeals for the Federal Circuit

2005-1330, -1582

DIPPIN' DOTS, INC. and CURT D. JONES,
Plaintiffs-Appellants,

v.

THOMAS R. MOSEY, DOTS OF FUN, INTERNATIONAL LASER EXPRESSIONS, INC. (also known as I.L.E., Inc.),
Defendants-Cross Appellants,

and

NICHOLAS ANGUS,
Defendant/Counterclaimant-Cross Appellant,

and

FROSTY BITES DISTRIBUTION LLC,
Defendant-Appellee,

and

FROSTY BITES DISTRIBUTOR OF FLORIDA, INC.,
FROSTY BITES DISTRIBUTOR OF GEORGIA, INC.,
FROSTY BITES OF MICHIGAN, INC.,
J&J CONCESSIONS OF NEW JERSEY, INC.,
FROSTY BITES ICE CREAM COMPANY, LLC,
FROSTY BITES SOUTH, INC.,
INTERNATIONAL ASSOCIATION OF AMUSEMENT PARKS
AND ATTRACTIONS, FROSTY BITES OF NEW YORK, LLC,
and FROSTY BITES ICE CREAM DEVELOPMENT, LLC,
Defendants,

v.

F. ROBERT ESTY, JR., BARRY JAY BASS,
VICTOR BAUER, JACK MILLER, DANIEL
KILCOYNE,
SHAWN P. KILCOYNE, and DANIEL DOPKO,
Counterclaim Defendants,
and
FROSTY BITES, INC.
(now known as Mini Melts, Inc.),
Counterclaim Defendant-Cross Appellant.

DECIDED: February 9, 2007

Before MAYER, RADER, and GAJARSA, Circuit Judges. GAJARSA, Circuit Judge.

This is a patent infringement and antitrust case dealing with a unique ice cream product. Plaintiffs Dippin' Dots, Inc. and Curt D. Jones (collectively "DDI") appeal from the district court's claim construction and summary judgment of noninfringement of U.S. Patent No. 5,126,156 ("the '156 patent") and from the judgment following jury trial that all claims of that patent are obvious, that the patent is unenforceable due to inequitable conduct during prosecution, and that DDI violated the antitrust laws by asserting a patent that had been procured through fraud on the Patent Office. We affirm the judgments of noninfringement, obviousness, and unenforceability, but reverse as to the antitrust counterclaim.

I. BACKGROUND

A. The Technology and Patent

The '156 patent, covering subject matter invented by plaintiff Jones and exclusively licensed to plaintiff Dippin' Dots, is directed to a process for making a form of cryogenically prepared novelty ice cream product. Claim 1, the only independent claim, reads:

> A method of preparing and storing a free-flowing, frozen alimentary dairy product, comprising the steps of:
>
> [(1)] preparing an alimentary composition for freezing;
>
> [(2)] dripping said alimentary composition into a freezing chamber;
>
> [(3)] freezing said dripping alimentary composition into beads;
>
> [(4)] storing said beads at a temperature at least as low as -20° F. so as to maintain said beads free-flowing for an extended period of time;
>
> [(5)] bringing said beads to a temperature between substantially -10° F. and -20° F. prior to serving; and
>
> [(6)] serving said beads for consumption at a temperature between substantially -10° F. and -20° F. so that said beads are free flowing when served.

'156 patent col.6 ll.41-57 (numbering added for reference). DDI has commercialized this process. The ice cream it produces, sold under the Dippin' Dots brand, is known to patrons of amusement parks, stadiums, shopping malls, and the like.

The initial application that eventually issued as the '156 patent, filed on March 6, 1989, omitted the final "serving" step from Claim 1. The examiner rejected all of the claims as obvious in light of Canadian Patent No. 964,921, of Aref et al. DDI appealed the rejections to the Board of Patent

Appeals and Interferences ("Board"), which affirmed the rejection. DDI then filed a continuation application, amending Claim 1 by adding the "serving" step. The examiner again rejected over the Aref reference, noting that "dependent on the food product being served," it would be obvious to serve the product in a cold, free-flowing state. DDI then submitted a declaration pursuant to 37 C.F.R. § 1.132 in which it submitted evidence of the significant commercial success of its method. It argued that its commercial success should weigh against a finding of obviousness. See Graham v. John Deere Co., 383 U.S. 1, 17-18 (1966) (noting that commercial success is one of the "secondary considerations" that may serve as "indicia of . . . nonobviousness"). The examiner agreed and the '156 patent issued in June 1992.

B. The Festival Market Sales

Much of the debate in this case centers on the import of sales made at the Festival Market mall in Lexington, Kentucky, more than a year before DDI filed its patent application. Sales made more than one year before the patent's priority date implicate the on-sale bar of 35 U.S.C. § 102(b). For the '156 patent, this critical date is March 6, 1988. Starting on July 24, 1987, Jones sold cryogenically-prepared, largely beaded ice cream at the Festival Market. During Jones's time at Festival Market, which lasted at least until July 29th, over 800 customers purchased his beaded ice cream and others received free samples. The customers were permitted to leave with the product and were not restricted by any kind of confidentiality agreement. Jones later testified that his main goal at the Festival Market was to "get

. . . test-marketing information" and not to further develop technical aspects of his product such as particular temperature ranges for storage and service.

It is undisputed that the Festival Market sales were never disclosed to the Patent and Trademark Office ("PTO") during prosecution of the '156 patent. The declaration of commercial success which ultimately persuaded the examiner to grant the patent contained a sworn statement by Jones that "[t]he initial sales were in March of 1988," which was on or after the critical date.

Jones testified that at Festival Market he only practiced the first three steps of the claimed method, not the storing, bringing, or serving steps. He testified that he considered the evidence of what had happened at Festival Market to be irrelevant to patentability. The attorney who prosecuted the '156 patent, Warren Schickli, testified that he considered the sales to have been experimental since the process as practiced at Festival Market could not be feasibly commercially exploited. He also testified that the Festival Market ice cream was not sold for "direct consumption" under the meaning of Claim 1, because the ice cream was too cold to eat comfortably when initially given to the consumer.

C. Prior Litigation

The controversy in this case began when several of DDI's distributors severed their relationship, found alternative manufacturing sources, and entered into competition against DDI. DDI initiated a series of patent infringement lawsuits against its new competitors in various judicial districts. In this appeal, the defendants fall

into two primary categories: the "manufacturing parties" who make the competing ice cream product and the "distributing parties" who sell it to consumers.[1] The defendants counterclaimed for violation of § 2 of the Sherman Act due to DDI's allegation of patent infringement based on a fraudulently acquired patent. This type of antitrust claim has become known as a "Walker Process" claim, named for the Supreme Court's decision in Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177 (1965). The various suits were consolidated by the Judicial Panel on Multi-District Litigation for pretrial proceedings before the United States District Court for the Northern District of Georgia, with Judge Thomas W. Trash presiding. That court adopted in large part an earlier-recommended claim construction by a special master. In re Dippin' Dots Patent Litig., 249 F. Supp. 2d 1346, 1366 (N.D. Ga. 2003). It issued summary judgment of noninfringement both literally, id. at 1368, and via the doctrine of equivalents, id. at 1370-71. It refused to grant summary judgment to any party on invalidity, id. at 1362, 1364, or on inequitable conduct, id. at 1365.[2]

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[1] The Manufacturing Parties are Defendants Thomas Mosey, Dots of Fun, International Laser Expressions, Inc. Nicholas Angus, and Frosty Bites, Inc. (now known as Mini Melts, Inc.). Defendant Frosty Bites Distribution, its various local affiliates, and individuals such as founder Victor Bauer are the distributing parties. The issues in this case are not generally resolved in a manner unique to particular defendants, so we refer collectively to "the defendants" where appropriate.

[2] The district court also granted summary judgment in favor of the defendants as to claims of trade dress infringement, id. at 1374-75, and trade secret violations, id. at 1376. It granted summary judgment to the plaintiffs on a minor contract issue. Id. at 1378. These issues are not before us on appeal. The trade dress issue was appealed separately to the Eleventh Circuit, which

After the pretrial proceedings in the Northern District of Georgia were completed, the case was remanded to the United States District Court for the Northern District of Texas. Judge Thrash, sitting by designation, continued to preside over the Northern District of Texas proceedings. That court conducted a jury trial on the issues of invalidity, unenforceability, and antitrust violations by DDI. By special verdict, the jury found that the sales by Jones prior to March 1988 could be asserted against the patent as prior art and that all claims of the '156 patent were invalid as obvious. The jury also found that both Jones and Schickli had, with intent to deceive, made material misrepresentations or omissions in violation of the duty of candor to the PTO. It also determined that defendants Mini Melts, Inc. and Frosty Bites Distribution had proven all required elements of their antitrust counterclaim, including the requisite fraud on the PTO. However, it found no antitrust damages, granting the counterclaim plaintiffs zero dollars in damages on their Sherman Act counterclaim. The district court denied DDI's motion for judgment notwithstanding the verdict (JMOL), finding that there was sufficient evidence for the jury to find all claims obvious and that DDI had withheld a material reference with the deceptive intent required for Walker Process liability. The district court then weighed that same evidence of intent and materiality itself and found the patent unenforceable due to inequitable conduct before the PTO. In its final judgment dated February 28, 2005, it awarded attorney fees under the Clayton Act to defendant Frosty Bites Distribution ("FBD") in the amount of $676,675.46.

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affirmed. Dippin' Dots, Inc. v. Frosty Bites Distrib., 369 F.3d 1197 (11th Cir. 2004).

The defendants appealed to this court on March 25, 2005. After the notice of appeal was filed, the district court made two additional rulings. On August 4, 2005, it granted defendant Mosey's motion for attorney fees under the Clayton Act, which had been outstanding at the time of the final judgment. On August 18, 2005, FBD moved for an amendment of the attorney fee order to add fees under 35 U.S.C. § 285, the patent statute's fee-shifting provision. We deactivated the appeal while that motion was pending. On October 13, 2005, the district court granted FBD's motion and awarded it an additional $504,158.16 in fees under § 285. On November 18, 2005, this court reactivated the appeal and set a briefing schedule. DDI's opening brief included challenges to the August 4 and October 13 fee awards. A motions panel of this court ruled that, since DDI had failed to amend its March 25 notice of appeal to include references to the later district court orders, we lacked jurisdiction to hear DDI's challenge to those later orders. Dippin' Dots v. Mosey, No. 05-1330, slip op. at 3 (Fed. Cir. May 1, 2006). DDI was directed to file a replacement brief omitting the arguments held to be jurisdictionally barred. Id., slip op. at 4.

In its amended brief, DDI appeals the claim construction and summary judgment of noninfringement, the refusal to overturn the jury verdict of obviousness and liability under the antitrust laws, the finding of inequitable conduct, and the award of attorneys' fees under the Clayton Act granted to FBD. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

II. DISCUSSION

A. Claim Construction and Infringement

DDI challenges the summary judgment of noninfringement on the grounds that the district court[3] construed the claims of the '156 patent erroneously. Its primary arguments relate to the appropriate reach of the term "beads" in Claim 1, which the district court construed to mean "small frozen droplets . . . which have a smooth, spherical (round or ball shaped) appearance." The district court's construction also excluded processes which produce any "irregular or odd shaped particles such as 'popcorn.'" The district court correctly found that the claim steps mentioning "beads" were limited to covering processes that produce beads and only beads. The accused process produces both spheres and irregular particles, so under this construction, the defendants do not infringe. DDI objects both to the definition of "beads" and to the district court's refusal to use the word "comprising" to extend the coverage of the claim beyond a beads-only process. As to the definition of "beads," the district court correctly noted that the written description specifically describes "beads" as having a "smooth, spherical appearance." '156 patent col.5 ll.22-23. Indeed, DDI argued to the Special Master before whom the construction issue was originally presented that a "bead" was "a small round ball or round drop." There is no error in the district court's definition of this term.

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[3] As described supra, the claim construction and summary judgment phases of this litigation were handled by the United States District Court for the Northern District of Georgia. "The district court" as used in this section refers to that court.

As to DDI's second argument, we acknowledge that the term "comprising" raises a presumption that the list of elements is nonexclusive. See Genentech, Inc. v. Chiron Corp., 112 F.3d 495, 501 (Fed. Cir. 1997). However, "'[c]omprising' is not a weasel word with which to abrogate claim limitations." Spectrum Int'l, Inc. v. Sterilite Corp., 164 F.3d 1372, 1380 (Fed. Cir. 1998). "Comprising" appears at the beginning of the claim—"comprising the steps of"—and indicates here that an infringing process could practice other steps in addition to the ones mentioned. Those six enumerated steps must, however, all be practiced as recited in the claim for a process to infringe. The presumption raised by the term "comprising" does not reach into each of the six steps to render every word and phrase therein open-ended—especially where, as here, the patentee has narrowly defined the claim term it now seeks to have broadened. The district court's limitation of the claim scope to exclude processes that produce some irregularly shaped particles is correct.

DDI also objects to the district court's definition of "free flowing," but the court did not rely on that definition to support its summary judgment ruling. Dippin' Dots, 249 F. Supp. 2d at 1367 ("Since Defendants' process produces beads and irregularly shaped particles of ice cream, Defendants' method does not literally infringe the '156 patent."). Since that basis of the district court's decision was based on a properly construed claim term, we affirm the summary judgment of no literal infringement. DDI does not appeal the summary judgment of noninfringement under the doctrine of equivalents, so the court need not consider the doctrine of equivalents.

B. Obviousness

The case was transferred to the Northern District of Texas and tried to a jury, which found all claims of the '156 patent to be obvious. When reviewing a district court's JMOL determination as to obviousness, "[t]his court reviews a jury's conclusions on obviousness, a question of law, without deference, and the underlying findings of fact, whether explicit or implicit within the verdict, for substantial evidence." LNP Eng'g Plastics, Inc. v. Miller Waste Mills, Inc., 275 F.3d 1347, 1353 (Fed. Cir. 2001). Those factual underpinnings include the scope and content of the prior art, differences between the prior art and the claims at issue, and the level of ordinary skill in the art. Graham, 383 U.S. at 17. Our precedent requires that the party urging obviousness demonstrate a teaching, suggestion, or motivation to combine references. C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1351 (Fed. Cir. 1998). This test is a flexible one which may find motivation to combine in the knowledge of one skilled in the art or in the nature of the problem to be solved. Alza Corp. v. Mylan Labs., Inc., 464 F.3d 1286, 1291 (Fed. Cir. 2006). Secondary indicia of nonobviousness, such as commercial success, long-felt need, or failure of others are also relevant. Graham, 383 U.S. at 17-18.

To find obviousness in light of the Festival Market sales requires two conclusions: first, those sales must have been in the prior art; second, the process practiced at Festival Market combined with any other relevant prior art must render the claims of the '156 patent obvious. Substantial evidence existed for the jury to find the facts necessary to support both conclusions.

The first question is whether the sales at Festival Market constitute prior art that can be asserted against the '156 patent claims in an obviousness analysis. It is undisputed that those sales occurred before the patent's critical date of March 6, 1988. Sales made before the critical date would render invalid any claims that they anticipate, but the defendants do not allege here that the Festival Market sales embodied every element of any claim of the '156 patent. Instead, they argue that the claims are obvious in view of the Festival Market sales combined with the prior art cited by the examiner during prosecution. Those sales may indeed be considered when determining whether the claims are invalid for obviousness. The public sale of goods produced by a process more than one year before a patent is filed places that process in the § 102(b) prior art. See Invitrogen Corp. v. Biocrest Mfg., 424 F.3d 1374, 1382 (Fed. Cir. 2005) (citing Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 520 (2d Cir. 1946) (Learned Hand, J.)). Prior art under the § 102(b) on-sale bar is also prior art for the purposes of obviousness under § 103. See LaBounty Mfg. v. Int'l Trade Comm'n, 958 F.2d 1066, 1071 (Fed. Cir. 1992) ("Section 102(b) may create a bar to patentability . . . in conjunction with [§ 103], if the claimed invention would have been obvious from the on-sale device in conjunction with the prior art."). DDI argues that the sales at Festival Market were experimental in nature and therefore avoid the on-sale bar. In light of Jones's testimony that his purpose was to determine the marketability of his ice cream product and not to improve it technically, the jury could have found facts supporting a conclusion that the sales were not experimental. See In re Smith, 714 F.2d 1127, 1135 (Fed. Cir. 1983) ("The

experimental use exception . . . does not include market testing where the inventor is attempting to gauge consumer demand for his claimed invention."); see also Paragon Podiatry Lab., Inc. v. KLM Labs. Inc., 984 F.2d 1182, 1193 (Fed. Cir. 1993). The Festival Market sales are therefore prior art citable against the patent claims for obviousness purposes.

The second question is whether the Festival Market sales, considered as prior art to the '156 patent, render its claims invalid for obviousness. We conclude that they do. The first three steps of the patented process (preparing, dripping, and freezing) were concededly practiced at Festival Market. The last two—bringing to a higher temperature and then serving at that temperature for direct consumption—were at least very closely approximated. No evidence of the exact temperature of any product served at Festival Market has been presented, but it would have been obvious in light of the activity there to measure that temperature and serve the product within an easily determined range of palatability. The fourth step, "storing" at a very cold temperature for an extended period of time, may not have been present, but extended cold storage was an obvious elaboration on the Festival Market sales in order to distribute and retail the product. The motivation for DDI to make these trivial modifications is readily apparent from the problem to be solved. Someone of ordinary skill in the art of ice cream retailing, seeking to commercially develop the inventive kernel found at Festival Market, would immediately seek the appropriate temperature ranges within which to store and serve the product. See Alza, 464 F.3d at 1291 (noting that teaching, motivation, or suggestion can come from nature of problem to be solved).

The jury could reasonably have found that the secondary factor of commercial success advanced by Jones to obtain the '156 patent was obviated by the Festival Market sales. If the factors that led to DDI's later commercial success were largely present at Festival Market, later changes to the process encompassed by the '156 patent could reasonably be seen as not improving the prior art's commercial appeal much, if at all. See J.T. Eaton & Co. v. Atlantic Paste & Glue Co., 106 F.3d 1563, 1571 (Fed. Cir. 1997) ("the asserted commercial success of the product must be due to the merits of the claimed invention beyond what was readily available in the prior art.").

The factual underpinnings implicit in the jury's verdict are supported by substantial evidence, and based on those facts, we affirm the judgment of obviousness.

C. Inequitable Conduct

We have stated that "[a] patent may be rendered unenforceable for inequitable conduct if an applicant, with intent to mislead or deceive the examiner, fails to disclose material information or submits materially false information to the PTO during prosecution." Digital Control Inc. v. Charles Mach. Works, 437 F.3d 1309, 1313 (Fed. Cir. 2006). The party urging unenforceability must show by clear and convincing evidence that the applicant met "thresholds of both materiality and intent." Molins PLC v. Textron, 48 F.3d 1172, 1178 (Fed. Cir. 1995). Where, as here, those factual findings were made by the district court, we review them for clear error. Id. The ultimate determination of inequitable conduct is committed to the sound discretion of the trial court.

We review for abuse of that discretion. Union Pac. Res. Co. v. Chesapeake Energy Corp., 236 F.3d 684, 693-94 (Fed. Cir. 2001).

The first prong of the inequitable conduct test, materiality, is clearly met here. As discussed supra, the Festival Market sales render the '156 patent invalid for obviousness. Had those sales been disclosed to the PTO, the patent may or may not have issued. At the very least, the existence of such sales prior to the critical date is a matter that "a reasonable examiner would have considered . . . important in deciding whether to allow the . . . application." Dayco Prods., Inc. v. Total Containment, Inc., 329 F.3d 1358, 1363 (Fed. Cir. 2003); see also Digital Control, 437 F.3d at 1316 (holding that "reasonable examiner" standard remains sufficient ground for inequitable conduct materiality even after 1992 amendment of 37 C.F.R. § 1.56).

The question of deceptive intent is a more difficult one, but we find no clear error in the district court's determination on this point. "'Smoking gun' evidence is not required in order to establish an intent to deceive . . . . Rather, this element of inequitable conduct [] must generally be inferred from the facts and circumstances surrounding the applicant's overall conduct." Paragon Podiatry Lab., Inc. v. KLM Labs. Inc., 984 F.2d 1182, 1189 (Fed. Cir. 1993). We have noted that omission of sales made before the critical date is especially problematic:

> Absent explanation, the evidence of a knowing failure to disclose sales that bear all the earmarks of commercialization reasonably supports an inference that the

> inventor's attorney intended to mislead the PTO. The concealment of sales information can be particularly egregious because, unlike the applicant's failure to disclose, for example, a material patent reference, the examiner has no way of securing the information on his own.

Id. at 1193. While DDI wholly neglected to disclose the Festival Market sales to the PTO, it enthusiastically touted sales made after the critical date as evidence of the commercial appeal of its process. That combination of action and omission permits an inference of the minimum, threshold level of intent required for inequitable conduct. The evidence to support a finding of intent may not be particularly strong here (a point we discuss further in Part II.D, infra.) However, the district court was permitted to balance the relatively weak evidence of intent together with the strong evidence that DDI's omission was highly material to the issuance of the '156 patent and to find that on balance, inequitable conduct had occurred.[4] Such a finding, as an exercise of the district court's equitable powers, is within its discretion. See Molins, 48 F.3d at 1178 ("Once threshold findings of materiality and intent are established, the court must weigh them to determine whether the equities warrant a conclusion that inequitable conduct occurred."). We perceive no abuse

[4] The district court characterized DDI's intent to deceive as "of a high nature." We disagree, but believe that in light of the high materiality of the nondisclosure, inequitable conduct can still be found here even though the evidence reveals less than an egregiously willful intent to deceive.

of discretion here. The district court's inequitable conduct finding is correct.

D. Walker Process Antitrust Claim

The defendants in this case counterclaimed against DDI for violation of § 2 of the Sherman Act, and the same jury that found the patent obvious found DDI liable on that counterclaim. Proof that a patentee has "obtained the patent by knowingly and willfully misrepresenting facts to the Patent Office . . . [is] sufficient to strip [the patentee] of its exemption from the antitrust laws." Walker Process Equip., Inc. v. Food Mach. & Chem. Corp., 382 U.S. 172, 177 (1965). A party who asserts such a fraudulently obtained patent may be subject to an antitrust claim. If a patentee asserts a patent claim and the defendant can demonstrate the required fraud on the PTO, as well as show that "the other elements necessary to a § 2 case are present," the defendant-counterclaimant is entitled to treble damages under the antitrust laws. Id. at 175.

The first barrier for a Walker Process claimant to clear is the requirement that the patent be obtained through actual fraud upon the PTO. This question is governed by Federal Circuit law. Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059, 1068 (Fed. Cir. 1998) (en banc in relevant part). A finding of inequitable conduct does not by itself suffice to support a finding of Walker Process fraud, because "inequitable conduct is a broader, more inclusive concept than the common law fraud needed to support a Walker Process counterclaim." Nobelpharma, 141 F.3d at 1069. To demonstrate Walker Process fraud, a claimant must make higher threshold showings of both materiality and intent

than are required to show inequitable conduct. Id. at 1070-71; C.R. Bard, Inc. v. M3 Sys., Inc., 157 F.3d 1340, 1364 (Fed. Cir. 1998) (Walker Process claimant "must make a greater showing of scienter and materiality than when seeking unenforceability based on conduct before the Patent Office"). Furthermore, a finding of Walker Process fraud cannot result from an equitable balancing between the two factors; a strong showing of one cannot make up for a deficiency in the other. Nobelpharma, 141 F.3d at 1071. The difference in breadth between inequitable conduct and Walker Process fraud admits the possibility of a close case whose facts reach the level of inequitable conduct, but not of fraud before the PTO. This is such a case.

The heightened standard of materiality in a Walker Process case requires that the patent would not have issued but for the patent examiner's justifiable reliance on the patentee's misrepresentation or omission. C.R. Bard, 157 F.3d at 1364. The defendants have established materiality even under this strict threshold, since the evidence supports a finding that the patent would not have issued if DDI had disclosed the Festival Market sales to the PTO. The difficulty comes in establishing that the omission of those sales was done with fraudulent intent. DDI did make certain statements to the PTO that would have been more completely accurate had it included information about the Festival Market sales. For instance, it suggested that its method was "the first method to allow serving of a completely free flowing frozen alimentary dairy product for direct consumption by consumers." That statement would have been more helpful to the PTO if it had also disclosed that the first free-flowing sales had arguably happened at Festival Market, but the

statement was not actually false. Likewise, DDI argued against obviousness by pointing out that none of the cited references taught free-flowing service. Again, this statement would have better informed the PTO if it had clarified that elsewhere in the prior art, such service arguably existed, but again, the statement was true. The problem was not with its falsity but with its incompleteness.

Ultimately, the defendants' fraud case here is built only upon DDI's omission of the Festival Market sales from the prosecution record. While Walker Process intent may be inferred from the facts and circumstances of a case, "[a] mere failure to cite a reference to the PTO will not suffice." Nobelpharma, 141 F.3d at 1071. This is not to say that an omission always reduces to "mere failure to cite." We acknowledged in Nobelpharma "that omissions, as well as misrepresentations, may in limited circumstances support a finding of Walker Process fraud . . . because a fraudulent omission can be just as reprehensible as a fraudulent misrepresentation." 141 F.3d at 1070. We believe, though, that to find a prosecution omission fraudulent there must be evidence of intent separable from the simple fact of the omission. A false or clearly misleading prosecution statement may permit an inference that the statement was made with deceptive intent. For instance, evidence may establish that a patent applicant knew one fact and presented another, thus allowing the factfinder to conclude that the applicant intended by the misrepresentation to deceive the examiner. That is not the case with an omission, which could happen for any number of nonfraudulent reasons—the applicant could have had a good-faith belief that disclosure was not necessary, or simply have forgotten to make the required disclosure. In

this case, DDI argues that it did not disclose the Festival Market sales to the PTO because it believed that the product there was made without practicing the "storing," "bringing," or "serving" steps of the claim within the specified temperature ranges, and that therefore the Festival Market sales were merely cumulative to other prior art references which also lacked those three steps. The jury was of course allowed to disbelieve or discount evidence tending to support this claim. However, the defendants submitted no evidence of their own—aside from the absence of the Festival Market sales from the prosecution record—which affirmatively shows DDI's fraudulent intent. That intent cannot be shown merely from the absence of evidence which would come about from the jury's discounting DDI's explanation.

Nobelpharma serves as a good example of the sort of facts that do prove Walker Process fraud by omission. In that case, the inventors had transmitted to their Swedish patent agent a draft patent application which included a citation to a book written by the patentee in 1977. 141 F.3d at 1062. That book was eventually held to anticipate the patent. Id. at 1072. The agent "deleted all reference to the 1977 Book from the patent application that was ultimately filed in Sweden" and then also failed to mention the book in the U.S. application that led to the patent at issue. Id. at 1062. When pressed on the issue at trial, the agent "could not explain, even in retrospect, why he deleted all reference to the 1977 Book." Id. at 1072. We found that the evidence of actual deletion by the patent agent gave the jury reasonable ground to find intent to defraud by the patentees. Id.

There is no similarly strong evidence that the omission in this case was fraudulent. It might be argued that because the omitted reference was so important to patentability, DDI must have known of its importance and must have made a conscious decision not to disclose it. That argument has some force, but to take it too far would be to allow the high materiality of the omission to be balanced against a lesser showing of deceptive intent by the patentee. Weighing intent and materiality together is appropriate when assessing whether the patentee's prosecution conduct was inequitable. Molins, 48 F.3d at 1178. However, when Walker Process claimants wield that conduct as a "sword" to obtain antitrust damages rather than as a mere "shield" against enforcement of the patent, Nobelpharma, 141 F.3d at 1070, they must prove deceptive intent independently. The defendants have not done so here to the extent necessary for a reasonable jury to find Walker Process fraud. The finding of fraud on the PTO is therefore reversed.

DDI also argues that the antitrust judgment must be reversed because the jury was not presented with sufficient evidence of the definition of the relevant market. Fraudulent acquisition of the asserted patent strips the Walker Process defendant[5] of its antitrust immunity, but that is the beginning, not the end, of the inquiry. The counterclaimant must also show the basic elements of an antitrust violation defined by the regional circuit's law, including that the patentee's behavior was directed to a relevant product market. Unitherm Food Sys., Inc.

[5] Here that defendant is the plaintiff DDI, which is defending against a Walker Process counterclaim

v. Swift-Eckrich, Inc., 375 F.3d 1341, 1363 (Fed. Cir. 2004), rev'd on other grounds, 126 S. Ct. 980 (2006).[6] In this case, DDI's antitrust immunity remains intact due to insufficient evidence of fraud. We therefore reach neither DDI's argument on this point nor the defendants' argument that DDI waived the market definition issue by failing to raise it below.

E. Attorney Fees

With the judgment of antitrust liability reversed, the grant of attorney's fees under § 4 of the Clayton Act must be vacated. As mentioned supra, a motions panel of this court has found that we lack jurisdiction to hear DDI's challenge of that fee grant as to defendant Mosey. Dippin' Dots v. Mosey, No. 05-1330, slip op. at 3 (Fed. Cir. May 1, 2006). However, our vacatur of fees is entirely derivative of our ruling on the merits, not based on an acceptance of DDI's jurisdictionally barred direct challenge to the fee award. The vacatur therefore extends to all defendants, including Mosey.[7]

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[6] Unitherm applied Tenth Circuit antitrust law. Id. (citing United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003); Telecor Commc'ns v. Sw. Bell Tel. Co., 305 F.3d 1124, 1130-31 (10th Cir. 2002)). Fifth Circuit law also requires proof of a relevant market. Doctor's Hosp. v. Se. Med. Alliance, 123 F.3d 301, 311 (5th Cir. 1997).

[7] Defendants move to strike the portions of DDI's amended brief which argue that the fee awards should be vacated if DDI prevails on the merits. Br. of Mosey et al. at 1; Br. of Frosty Bites Distribution LLC at 1. Their objections are denied.

DDI argued as a separate ground for reversal of the attorney fee award that a jury verdict indicating zero dollars in antitrust damages cannot support a Clayton Act fee award. Since the judgment of liability is reversed, we do not reach this argument.

The district court indicated that if it were to reduce its Clayton Act fee grant, it would increase the fees under the Patent Act to compensate. With the Clayton Act fee grant vacated, the district court may review the award of fees under the patent statute. On remand, the district court may determine whether and to what extent fees under 35 U.S.C. § 285 are appropriate.

III. CONCLUSION

We affirm the findings of noninfringement, obviousness, and unenforceability due to inequitable conduct. We reverse the district court's denial of JMOL as to the antitrust counterclaim, vacate the grants of attorneys' fees under the Clayton Act, and remand for the district court to consider whether an additional fee award under the patent statute is available.

AFFIRMED-IN-PART, REVERSED-IN-PART, VACATED-IN-PART, AND REMANDED

No costs.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	CIVIL ACTION FILE
THOMAS R.MOSEY, et al.	§	NO.3:96-cv-1959-L
	§	
Defendants.	§	

OPINION AND ORDER

This is a patent infringement action. It is before the Court on the Defendant Frosty Bites Distribution, LLC's Motion for Attorneys' [1] Fees under § 285 of the Patent Act Following Remand [Doc. 1002], the Manufacturing Parties' Renewed Motion for Attorney Fees Under § 285 of Patent Act [Doc. 1003], the Plaintiffs' Rule 60(b) Motion to

[1] The parties have used the phase "attorney fees" in different ways. For example, sometimes they use "attorneys' fees" and other times they use "attorneys fee." In my view, "attorney fees" is correct. First, it reflects the actual statutory language. See 35 U.S.C. § 285 ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."). Second, the possessive is inappropriate because the fees do not actually belong to the attorneys. Rather, the fees belong to the client to offset the burdensome costs of litigation in exceptional cases. The statute awards the fees to the "prevailing party," not the "prevailing lawyers." The form of phase to "avoid at all costs" is "attorneys fees." Bryant A. Garner, *A Dictionary of Modern Legal Usage* 91(2nd ed. 1995).

Vacate or Stay Attorney's Fee Awards Under the Patent Act [Doc. 1005], and Frosty Bites

Distribution, LLC's Cross-Motion to Lift the Stay of the 2005 Section 285 Award [Doc. 1012].

I. BACKGROUND

This case has been around for a long time. When the Texas case was the first filed in 1996, President William Jefferson Clinton was in his first term of office, O.J. Simpson's civil trial had just commenced, and Martina Hingis had just become the youngest person in history to win Winbledon in women's doubles. The internet was new and people were first started to communicate by e-mail. In those days, court cases consisted of paper files rather than digital images. I first got attached to the Dippin' Dots patent litigation in April 2000. It has been with me ever since. It has been to Eleventh Circuit.[2] It took me to Texas for a trial. It is now back before me after a trip to the Federal Circuit where my final judgment were affirmed, reversed, vacated, and remanded.[3] This latest –dare I hope the last – round of litigation is a fight over attorney fees.

This is a patent infringement case dealing with a cryogenically frozen ice cream product which is subject of U.S. Patent No. 5,126,156 ("the '156 patent"). The litigation began in 1996 when Dippin' Dots sued the Defendant Mosey for patent

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[2] Dippin' Dots, Inc. v. Frosty Bites Distribution, LLC, 369 F.3d 1197 (11th Cir. 2004 (affirming summary judgment in favor of the Defendants on the Plaintiffs' trade dress claims).

[3] Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337 (Fed. Cir. 2007).

infringement for selling a similar product at a Dallas, Texas movie theater. The litigation heated up about four years later when a group of former

Dippin' Dots distributors began selling the Frosty Bites product. The Plaintiffs, Dippin' Dots, Inc. and Curt Jones, brought suits against various Frosty Bites manufacturing and distribution parties. In December 2000, all of the cases were consolidated for trial proceedings by the Judicial Panel on Multidistrict Litigation, transferred to the United States District Court for the Northern District of Georgia, and assigned to me. After pretrial proceedings, the original 1996 case was remanded to the Northern District of Texas. I went West with the case and presided over a jury trial on the issues of invalidity and unenforceability of the patent, and a "Walker Process"[4] antitrust counterclaim filed by the Defendants. The jury found for the Defendants on the question of invalidity, and concluded that the patent was obtained by a way of material misrepresentations or omissions to the Patent Trademark Office. It is also find in favor of the Defendants on their antitrust counterclaim but awarded no damages.

After the trial, Dippin' Dots filed a motion for summary judgment notwithstanding the verdict. I denied that. I determined that was sufficient evidence to find that the claims of the '156 patent were obvious and that Dippin' Dots had withheld material reference from the PTO. I then weight the evidence if intent and materiality and found that the patent was unenforceable due to inequitable conduct before the PTO. On February 18, 2005, I awarded

[4] Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965).

attorney fees under the Clayton Act to Frosty Bites Distribution in amount of $676,675.46.

On March 25, 2005, the Plaintiffs appealed. After the notice of appeal was filed, I made two additional rulings. On August 4, 2005 I granted the Manufacturing Parties' motion for attorney fees under Clayton Act, awarding approximately $1,9 million in attorney fees. I also granted Defendant Frosty Bites Distribution's request for fees under the Patent Act for approximately $250,000, but I denied the vast majority of the request on the grounds that it was duplicative with fees I awarded under the Clayton Act. On August 18, 2005, Frosty Bites moved for an amendment of the attorney fees Order which hopes of securing additional fees under the Patent Act. The Federal Circuit Court of Appeals deactivated the appeal while the motion was pending. On October 13, 2005, I amended the August 4, 2005 Order, and granting Frosty Bites' request for $504,158.16 in fees under the Patent Act. The Plaintiffs filed a supersedeas bond for this award, and the Court stayed its enforcement.

On November 18, 2005, the Federal Circuit reactivated the appeal and set a briefing schedule. The Plaintiffs' opening brief included challenges to the August 4, 2005 Order and October 13 attorney fees awards. They failed however, to file a supplemental notice of appeal regarding those orders. A motions panel of the United States Court of Appeals for the Federal Circuit ruled that the Plaintiffs' failure to amend the March 25, 2005 notice of appeal to include references to the later orders of this Court meant that it lacked jurisdiction to hear challenges to those orders. Dippin' Dots v. Mosey, No. 05-1330, slip op, at 3 (Fed. Cir. May 1, 2006).

On February 9, 2007, the United States Court of Appeals for the Federal Circuit affirmed this Court's decision on all of the patent claims and counterclaims, but reversed with respect to the Walker Process antitrust claim. Dippin' Dots, Inc. v. Mosey, 476 F.3d 1337 (Fed. Cir. 2007). Two aspects of the court's decision are noteworthy. First, the Court of Appeals upheld the finding of inequitable conduct. Id. at 1346. Second, in reversing the Walker Process antitrust counterclaim, the Court noted that"[a] finding of inequitable conduct does not by itself suffice to support a finding of Walker Process fraud, because inequitable conduct is a broader more inclusive concept than the common law fraud needed to support a Walker Process counterclaim." Id. at 1346 (quotation marks omitted). In other words, a "claimant must make higher threshold showings of both materiality and intent than are required to show inequitable conduct." Id.

According to the Court of Appeals this case falls in the magic middle – just enough deception for inequitable conduct, but not quite enough for Walker Process fraud. Id. at 1347 ("The difference in breadth between inequitable conduct and Walker Process fraud admits the possibility of a close case whose facts reach the level of inequitable conduct, but not of fraud before the PTO. This is such a case."). It then vacated the attorney fees award under the Clayton Act. Although the fee award was not directly before it, the court indicated that by reversing the Walker Process fraud claim, it had reversed the basis for the Clayton Act award.

Notably, the Court of Appeals did not vacate the Patent Act attorney fees award. The court

concluded by acknowledging that "[t]he district court indicated that if it were to reduce its Clayton Act fee grant, it would increase the fees under the Patent Act to compensate." Id. at 1349. "With the Clayton Act fee grant vacated, the district court may review the award of fees under the patent statute ... [and]

determine whether and to what extent fees under 35 U.S.C. § 285 are appropriate." Id.

II. DISCUSSION

A. The Plaintiffs' Rule 60(b) Motion to Vacate Fees

The Plaintiffs urge the Court to vacate the attorney fees previously awarded to Frosty Bites. Federal Rule of Civil Procedure 60(b) authorizes courts to relieve parties from a final judgment where the "prior judgment upon which it is base has been reversed or otherwise vacated," Fed. R. Civ. P. 60(b)(5), or for "any other reason justifying relief from operation of the judgment." Fed. R. Civ. P. 60(b)(6). The decision to grant or deny relief is within this Court's discretion. See Hesling v. CSX Transp., Inc., 396 F.3d 632,638 (5th Cir. 2005).

The thrust of the Plaintiffs' argument is that Federal Circuit's reversal of the Walker Process fraud claim simultaneously nullified the basis for this Court's decision to award Frosty Bites attorney fees under the Patent Act. They point out that in the August 4, 2005 Order, I awarded attorney fees on the ground that the jury's finding of "fraud committed on the Patent Office compel [led] a finding that this is an exceptional case" warranting a fee award Dippin' Dots v. Mosey, No. 3:96-CV-1959, at 4 (N.D. Tex.

Aug. 4, 2005). The Plaintiffs argue that the Court of Appeals court's reversal of the Walker Process claim undetermines my reason for awarding attorney fees.

There are two problems with the Plaintiffs' argument. First, the Walker Process fraud claim was not the basis for my decision to award attorney fees. I made it clear, by referring to Federal Circuit precedent – such a Zodiac Pool Care, Inc. v. Hoffinger Indus., Inc., 206 F.3d 1408, 1417 (Fed. Cir. 2000) -- that my decision to award fees could be justified by evidence of either fraud or inequitable conduct. I awarded fees based on my assignment of a multitude of factors such as "the closeness of this case, the tactics of counsel, the conduct of the parties, and ...other factors that ...contribute[d] to a fair allocation of the burdens of litigation as between winner and loser." Dippin' Dots v. Mosey, No. 3:96-CV-1959, at 4 (N.D. Tex. Aug. 4, 2005) (citing S.C. Johnson & Son, Inc. v. Carter-Wallace, Inc., 781 F.2d 198, 201 (Fed. Cir. 1986)).

As far as my use of the word "fraud" is concerned, it would be a mistake to read this as an indication that I only relied upon the jury's Walker Process verdict. First, my selection of language was deliberate. That is, I did not refer to the fraud as "Walker Process fraud." Although, the impulse is understandable, it is wrong to narrowly read my use of the word "fraud" in any technical or legalistic sense. My decision was specifically based upon the Plaintiffs' inequitable, and in my view egregious, conduct before the PTO, and not upon the Walker Process fraud claim. Second, the Federal Circuit affirmed the inequitable conduct judgment. Admittedly, the Court of Appeals viewed the evidence somewhat differently that I did. Hence, the remand. But it did not remand with directions to

vacate any award of attorney fees based upon inequitable conduct. Indeed, it remanded with express directions for me to consider awarding additional fees under the Patent Act.

Despite the fact that the Defendants did not succeed on their antitrust claim, the inequitable conduct ruling provides and adequate basis for the

attorney fee award. For the reasons set forth in my earlier Order, this is an exceptional case, there is clear and convincing evidence of inequitable conduct, and the award of attorney fees is appropriate. The motion, whether based upon Rule 60(b)(5) or 60(b)(6), should be denied.

B. Frosty Bites's Cross-Motion to Lift the Stay of Fees

Frosty Bites cross-moves for the Court to lift stay of the 2005 section 285 award. This Court stay enforcement of the 2005 award following the Plaintiffs' appeal. The 2005 section 285 award is now final, unappealed, and unappealable. Because the Plaintiffs have failed to put forth a persuasive reason to maintain the stay, the Court should grant Frosty Bites's motion to lift the stay.

C. Additional Attorney Fees Under the Patent Act

Both the Manufacturing Parties and the Distribution Parties are requesting additional fees under the Patent Act. The Act provides that "[t [he court in exceptional cases may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285. As indicate above, I have already determined

that this is an exceptional case, that there is clear and convincing evidence of inequitable conduct, and that attorney fees are appropriate. I turn to the parties' specific requests.

1. <u>The Manufacturing Parties' Motion for Attorney Fees</u>

The Manufacturing Parties are requesting fees in amount of "1,983,353,16, together with prejudgment and post-judgment interest at the highest legal rate." Specifically, they request $989,704.91 for Robert G. Oake, Jr., $970,205.50 for Rudolf O. Siegesmund, $18,430.25 for Baker & Butts, LLP., and $5,012.50 for Banowsky, Betz & Levine, P.C. By and large, the Defendants seek the same fees that were awarded under the Clayton Act, but they want them awarded under section 285 of the Patent Act. They are also requesting fees for time spent after they submitted the original fee request, and fees for time spent preparing this motion.

The Plaintiffs argue that the Defendants should not recover for the time spent on the antitrust counterclaim. The Plaintiffs contend that because the Defendants' counterclaim was reversed, they should be barred from recovering attorney fees for time spent on that issue. They claim that would be inequitable to award the Defendants $20,633.41 in fees for claims that ultimately failed as a matter of law. The Plaintiffs cite no case law for this proposition. In my view, it is eminently reasonable and appropriate to compensate the Defendants for costs associated with the overall defense of this lawsuit. This antitrust counterclaim involved the same basic assessment of whether Dippin' Dots behaved inappropriately before the PTO. Indeed, in

the past Order, I concluded that the work was so similar that to award fees for both Clayton Act and Patent Act work would be "duplicative." The attorney fee award should include compensation for time spent on the antitrust claim.

The Plaintiffs further contend that the Defendants should not be compensated for "non-patent work." They cite Gjerlov v. Schuyler Labs., Inc., 131 F.3d 1016, 1025 (Fed.Cir. 1997), to argue that "[w]hen an action embraces both patent and non-patent claims, no fees under section 285 can be awarded for time incurred in litigation of the non-patent issues." There is, however, an exception to the rule. "When an action combines both patent and nonpatent claims, the nonpatent issue may in some instances be so intertwined with the patent issue that the evidence would, in large part, be material for both types of issues." Stickle v. Heublein, Inc., 716 F2d 1550, 1564 (Fed. Cir. 1983). The issue comes down to whether a particular claim is a "wholly separate and separable claim from the patent issues." Id. Whether a particular claim is "so intertwined" appears to be an issue of fact.

Specifically, the Plaintiffs contend that the Defendants should not be compensated for time involved with the trade secrets aspects of the case. As they put it, "whether the facts relevant to defending the trade secret claim were also relevant to defending the patent infringement claim is irrelevant." (Pls.' Resp. in Opp'n to the Manufacturing Parties' Renew Mot. for Attorney Fees Under 35 U.S.C. § 285, at 13). The Defendants counter that "the trade secret action involved determining what aspects of DDI's operations were covered by the patent work and what aspects, if any, were trade secrets." (Reply Br. in Support of Mot. for

Attorneys' Fees Under § 285 of the Patent Act, at 10). If the facts relevant to defending a trade secret are also relevant to defending the patent infringement claim, it is certainly powerful evidence that the claims are intertwined. On the other hand, the Defendants have the burden of demonstrating why the issues are intertwined. Here, they have failed to discuss why the issues are intertwined in any meaningful way, and therefore, have not met their burden of proof. The final award of the attorney fees should deduct the $64,681.25 that the Defendants have contested.

By and large, however, the Manufacturing Parties' request is reasonable. In fact, this Court has already considered the reasonableness of the Clayton Act fee award and the reasonableness of the rates in the Clayton Act award. See Dippin' Dots, Inc. v. Mosey, 3:96-CV-1959-L, at 4 (N.D. Tex. June 4, 2004). The Manufacturing Parties are entitled to the full request, minus the $64,681.25 for work on the trade secrets claim.

2. Frosty Bites Distribution's Motion for Attorney Fees

In my October 13, 2005 Order, I awarded Frosty Bites fees under section 285 of the Patent Act. That fee award only involved fees for work performed before March 31, 2004. Frosty Bites now requested additional fees under section 285 for work performed after March 31, 2003. As indicated above, the Court finds that this case is exceptional, and that DDI's inequitable conduct warrants attorney fees.

The Plaintiffs challenge whether Frosty Bites's request is "reasonable." Under the Fifth Circuit law, the Court must determine the

reasonable numbers of hours expended on the litigation, and the reasonable hourly rates for the services rendered. Louisiana Power & Light Co. v. Kellstrom, 50 F.3d 319, 324 (5th Cir. 1995). Next, the Court must multiply the reasonable hours by the reasonable rates. Id. "The product of this multiplication is the lodestar, which the district court then either accepts or adjusts upward or downward, depending on the circumstances of the case." Id.

The Plaintiffs contend that awarding fees for antitrust work would be inequitable. I disagree. As noted above, the antitrust issues were intertwined with the patent issues, and the fact that the Federal Circuit reversed the Walker Process fraud claim does not alter the equities in any appreciable way. Dippin' Dots's conduct before the PTO was inappropriate and, in my judgment, outrageous enough to warrant attorney fees.

The Plaintiff contends that the Frosty Bites' attorneys failed to maintain sufficient records of whether the works they performed was on patent or on non-patent issues. In previous Orders, this Court has approved of Alston & Bird's method of documenting the hours its attorneys spent on the case. Looking at their records, it appears that they are 'substantially reconstructed and reasonably accurate." PPG Indus., Inc. v. Celanese Polymer Specialities Co., Inc., 840 F.2d 1565, 1570 (5th Cir. 1988). At the minimum, the records permit "meaningful review." Louisiana Power & Light Co., 50 F.3d at 327. The Court finds that Frosty Bites's request is reasonable. The motion should be granted for additional fees in amount of $1,372,223.04. The Court declines to award any additional fees in connection with the filing of this motion.

III. CONCLUSION

For reasons stated above, the Manufacturing Parties' Renewed Motion for Attorney Fees Under § 285 of the Patent Act [Doc. 1003] is GRANTED in the amount of $1,918,671.91 The Defendant Frosty Bites Distribution, LLC's Motion for Attorneys' Fees Under § 285 of the Patent Act Following Remand [Doc. 1002] is GRANTED in the additional amount of $1,372,223.04. The Plaintiffs' Rule 60(b) Motion to Vacate or Stay Attorney's Fee Awards Under the Patent Act [Doc. 1005] is DENIED. The Defendant Frosty Bites Distribution, LLC's Cross-Motion to Lift the Stay of the 2005 Section 285 Award [Doc. 1012] is GRANTED.

SO ORDERED, this 30 day of October, 2007.

/s/ Thomas W. Trash
THOMAS W. TRASH, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DIPPIN' DOTS, INC.,et al.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	CIVIL ACTION FILE
THOMAS R.MOSEY, et al.	§	NO.3:96-cv-1959-L
	§	
Defendants.	§	

OPINION AND ORDER

This is an action for patent infringement. It is before the Court on the Plaintiffs' Motion to Stay Awards Pending Appeal [Doc. 1026] which is GRANTED in part and DENIED in part. It is denied with respect to the 2005 attorney fees award to Frosty Bites Distribution under § 285 of the Patent Act. That award is final and unappealable. The motion is granted as to other awards for which the Plaintiffs have posted adequate bonds. The Plaintiffs' Motion for Approval of Superseades Bond [Doc. 1027] is GRANTED. Frosty Bites' Cross Motion for Attorney Fees Under the Patent Act [Doc. 1033] is DENIED. The Manufacturing Parties' Motion to Amend Order [Doc. 1029] is GRANTED. The Court clearly erred in failing to address the Defendants' request for an award of prejudgment and postjudgment interest on the attorney fees award. For the reasons previously stated, this is an exceptional case justifying an award of prejudgment

interest. Postjudgment interest is provided for pursuant to 25 U.S.C. § 1961. The Clerk is directed to enter an amendment to the judgment awarding the Manufacturing Parties the sum of $406,797.40 in prejudgment interest.

SO ORDERED, this 24 day of April, 2008.

/s/ Thomas W. Trash
THOMAS W. TRASH, JR.
United States District Judge

Note: This disposition is nonprecedential

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 2008-1125,-1337

DIPPIN' DOTS, INC. and CURT JONES
Plaintiffs-Appellants

v.

THOMAS S. MOSEY, DOTS OF FUN, INTERNATIONAL LASER EXPRESSIONS, INC. (also known as I.L.E., Inc.),
Defendants-Appellees
and
NICHOLAS ANGUS,
Defendant/
Counterclaimant-Appellee,
and
FROSTY BITES DISTRIBUTION LLC,
Defendant-Appellee
and
DISTRIBUTION PARTIES, FROSTY BITES DISTRIBUTOR OF FLORIDA, INC., FROSTY BITES DISTRIBUTOR OF GEORGIA, INC., FROSTY BITES OF MICHIGAN, INC., J&J CONCESSIONS OF NEW JERSEY, INC., FROSTY BITES ICE CREAM COMPANY, LLC, FROSTY BITES SOUTH, INC., FROSTY BITES NEW YORK, LLC, FROSTY BITES ICE CREAM DEVELOPMENT, LLC, and INTERNATIONAL ASSOCIATION OF AMUSEMENT PARKS AND ATTRACTIONS,

Defendants,

v.

BARRY JAY BASS, JAMES PEREZ, and JEANINE MATONE,

Counterclaim Defendants and

FROSTY BITES, INC. (now known as Mini Melts, Inc.),

Counterclaim Defendant-Appellee

Judgment

- -

Appeal from the United States District Court for the Northern District of Texas

- -

IN CASE NO(S). 3:96-cv-01959 and 3:01-CV-01532

This CAUSE have been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam: (MAYER, LOURIE and GAJARSA, Circuit Judges):

AFFIRMED. See Fed. Cir.R.36

ENTERED BY ORDER OF THE COURT

DATE: Nov-6 2008

s/Jan Horbaly, Clerk
Jan Horbaly, Clerk
FILED

U.S. Court of Appeals for
Federal Circuit
Nov. 6 2008
JAN HORBALY
CLERK

ISSUED AS A MANDATE: Dec. 23 2008

Rehearings

U.S. Court of Appeals for the Federal Circuit

2008-1125

11/20/2008	Entry 56: Appellants [Dippin' Dots, Inc., et al] – Combined Petition for Panel Rehearing and Rehearing Mail Service -11/19/2008. Filed: 11/20/2008.
	Entry 57: Petition/En Banc Action:Denied/Denied on 12/16/2008.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

DISPOSITION SHEET

TUESDAY, DECEMBER 16, 2008
11:00 A.M.
PRECEDENTIAL OPINIONS

2007-1553	AVOCENT HUNTSVILLE CORP., ET AL. v. ATEN INTERNATIONAL CO., LTD. On appeal from the United States District Court for the Northern District of Alabama. Judgment affirmed. Opinion by Linn, Circuit Judge. Separate dissenting opinion by Newman, Circuit Judge.
2007-1556,	KOYO SEIKO CO., LTD., ET AL. v. UNITED STATES, ET AL.
-1557,	On appeal from the United States Court of International Trade.
-1558,	Judgment affirmed.
2008-1038	Opinion by Friedman, Circuit Judge.

NONPRECEDENTIAL OPINION

2008-1164,	RESPIRONICS, INC., ET AL. v. INVACARE CORP.
-1193	USDCT/WDPA Linn, J. Affirmed-in-part reversed-in-part, vacated-in-part, and remanded.

DISMISSAL

2009-7008 RONALD H. FAGAN v. JAMES B. PEAKE, M.D., Secretary of Veterans Affairs

PETITION FOR REHEARING AND REHEARING EN BANC

2008-1125, DIPPIN' DOTS, INC., ET AL. v. THOMAS R. MOSEY, ET AL. v. BARRY
-1337 JAY BASS, ET AL.
Denied.